FOR ARGUMENT

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No. 90-1604

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAN MORALES, Attorney General of Texas,
Petitioner,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT AIRLINES

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QUESTION PRESENTED

Whether section 105(a)(1) of the Airline Deregulation Act, which provides that "no State . . . shall enact or enforce any law . . . or other provision having the force and effect of law relating to rates, routes, or services of any air carrier," bars Texas and other states from enforcing detailed rules that specify what air carriers may and may not say when advertising rates.

PARTIES BELOW

The appellants in the court below were the Attorney General of Texas and the Attorneys General of the following additional States: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

The appellees were Trans World Airlines, Inc., Continental Airlines, Inc., British Airways PLC, Pan American World Airways, Inc., Air Canada, Campagnie Nationale Air France, Alitalia-Linee Aeree Italiane, S.p.A., El Al Israel Airlines Ltd., Finnair, Lufthansa German Airlines, Japan Air Lines Company, Ltd., Qantas Airways Ltd., Scandinavian Airlines System, and Viacao Aerea Rio-Grandense, all of whom are respondents here. Respondents' parent companies and subsidiaries (except wholly owned subsidiaries) are listed in App. G, *infra*, at 34a-43a.

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BRIEF FOR THE RESPONDENT AIRLINES

OPINIONS BELOW

The opinion of the court of appeals affirming the grant of a permanent injunction (Pet. App. 1a-7a) is reported at 949 F.2d 141. The opinion of the district court granting the permanent injunction (Pet. App. 8a-12a) is not reported. The earlier opinion of the court of appeals affirming the grant of a preliminary injunction (Pet. App. 13a-47a) is reported at 897 F.2d 773. The opinions and orders of the district court granting the preliminary injunction (Pet. App. 48a-65a) are reported at 712 F. Supp. 99.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1991. The petition for a writ of certiorari was filed on April 16, 1991, and was granted on Novem-

ber 27, 1991. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI of the Constitution of the United States in pertinent part provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . .

Sections 102, 105, 411, and 1106 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1302, 1305, 1381, and 1506 (1988), in pertinent part provide:

> Section 102(a). In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> . . .
>
> (3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices . . . .
>
> (4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital . . . .
>
> . . .
>
> (7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . . .
>
> . . .

> (9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.

> Section 105(a)(1). . . . [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

> Section 411(a). The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

> Section 1106. Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

The Texas Deceptive Trade Practices—Consumer Protection Act, Texas Bus. & Comm. Code Ann. §§ 17.41, *et seq.* (Vernon 1986), in pertinent part provides:

> Section 17.46. (a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. . . .

(b) . . . [T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to . . . advertising goods or services with intent not to sell them as advertised . . . [or] making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions. . . .

(c)(1) It is the intent of the legislature that . . . the courts to the extent possible will be guided by . . . the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act.

STATEMENT

1. *The Airline Deregulation Act of 1978.* The airline industry was highly regulated prior to 1978. Pursuant to the Civil Aeronautics Act of 1938 ("Aeronautics Act"), ch. 601, 52 Stat. 973 (1938), the Civil Aeronautics Board ("CAB") exercised comprehensive regulatory control over interstate air carriers. Under this regulatory regime, competitive market forces played only a subsidiary role.

Although the CAB's regulatory authority was wide-ranging, the Aeronautics Act did not explicitly preempt state law. This left states free to impose additional nonconflicting economic regulations of their own. *See* Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. Air L. & Comm. 747, 750 (1979). Thus, some states exercised authority to approve intrastate routes and to set the intrastate rates that interstate carriers could charge. *See, e.g., People of the State of California v. CAB*, 581 F.2d 954, 956 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979); *Texas Int'l Airlines, Inc. v. CAB*, 473 F.2d 1150, 1152 (D.C. Cir. 1972); *People v. Western Airlines*, 42 Cal. 2d 261, 268 P.2d 723, *appeal dismissed*, 348 U.S. 859 (1954). And even though the CAB had authority, now codified in section 411(a) of the Federal Aviation Act of 1958 ("FAA Act"), 72 Stat. 731 (codified as amended, 49 U.S.C. app. § 1381(a)), to prohibit carriers from engaging in unfair or deceptive practices, states retained parallel authority to enforce their own rules against such practices. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

Over time, however, Congress became dissatisfied both with the tight regulatory control exercised by the CAB, "which restrict[ed] price competition at the public's expense," and also with the "confusing system of dual [federal and state] regulation." S. Rep. No. 631, 95th Cong., 2d Sess. 3, 98 (1978). Each of these perceived problems was addressed by the Airline Deregulation Act of 1978 ("Deregulation Act"), Pub. L. No. 95-504, 92 Stat. 1705 (1978).

As its name implies, the principal thrust of the Deregulation Act was to free the airline industry from its regulatory straitjacket and encourage "maximum reliance on competitive market forces." Deregulation Act § 102(a)(4), 49 U.S.C. app. § 1302(a)(4). Congress sought development "of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services." Deregulation Act § 102(a)(9), 49 U.S.C. app. § 1302(a)(9). Congress intended that, subject to a gradual phase-in, "prices, route structures, and the nature and variety of air services [would] be set by the independent forces of the free market and airline management decisions, rather than by the Board." S. Rep. No. 631 at 5.

The Deregulation Act marked a "major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation so as to place primary emphasis on competition." *Id.* at 52. The CAB was "instructed to make every effort to utilize competition and market forces to achieve regulatory goals." *Id.* As a corollary, the Act stressed the responsi-

bility of the federal government to police the market in order to ensure that it operates fairly and without distortion. In a new declaration of policy, Congress directed the CAB to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation," Deregulation Act § 102(a)(7), 49 U.S.C. app. § 1302(a)(7), and the CAB's pre-existing authority under section 411(a) to root out unfair and deceptive practices was preserved intact.

As an integral part of "this new, comprehensive legislation, which entirely overhauls the aviation regulatory system," H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. 56 (1978), Congress explicitly preempted state law, explaining that "it is important that only one standard of regulation be provided for airlines operating under the authority of the CAB." S. Rep. No. 631 at 98. Congress barred the states and their political subdivisions from "enact[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." Deregulation Act § 105(a)(1), 49 U.S.C. app. § 1305(a)(1). At the same time, however, Congress (without any reference in the legislative history to the fact that it was doing so) left standing section 1106 of the FAA Act (codified as amended, 49 U.S.C. app. § 1506), which was enacted in 1938 to provide that "[n]othing contained in this chapter shall in any way abridge or alter the remedies *now existing* at common law or by statute." Aeronautics Act, ch. 601, 52 Stat. at 1027 (emphasis added).

The Deregulation Act was followed by the Civil Aeronautics Board Sunset Act of 1984 ("Sunset Act"), Pub. L. No. 98-443, 98 Stat. 1703 (1984), which transferred the remaining powers and duties of the CAB to the Department of Transportation ("DOT"). The Sunset Act preserved (with minor amendment) both section 105(a)(1), providing for explicit federal preemption, and section 411(a), conferring explicit regulatory authority

over unfair and deceptive practices. *See* Sunset Act, 98 Stat. at 1704. The accompanying House report explained that continuing federal preemption was of particular importance in the area of consumer protection, for otherwise "regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines." H.R. Rep. No. 793, 98th Cong., 2d Sess. 4 (1984). The report further explained that Congress had chosen to consolidate the "CAB's consumer protection and unfair competitive practices authorities" in DOT, rather than conferring such authority jointly on DOT and the Federal Trade Commission ("FTC"), in order to avoid the potential for conflict or confusion that might arise "[i]f two agencies shared authority." *Id.* at 6.

2. *Federal regulation of unfair and deceptive practices.* Immediately following passage of the Deregulation Act, the CAB stated its understanding of the scope of preemption under section 105(a)(1). The CAB explained that "[o]ne policy behind section 105 was to prevent State economic regulation from frustrating the benefits of decreased Federal regulation" and that "[a]nother policy was to avoid the confusion caused under existing law which permitted dual State and Federal regulation." 44 Fed. Reg. 9948, 9949 (1979). Reading section 105(a)(1) in light of those policies, the CAB concluded that Congress "intended that the Board would exercise sole and complete economic regulatory jurisdiction over all federal carriers' operations." *Id.* at 9950. The CAB therefore announced that it was "occupying the entire field of economic regulations." *Id.* at 9948. Noting that inconsistent state regulation could "chill the enthusiasm of carrier management to make competitive route and rate decisions—for example, to enter new markets or adopt innovative pricing policies," *id.* at 9949, the CAB promptly issued a new regulation reiterating that states are preempted from engaging in the economic regulation

of interstate air carriers. *See* 14 C.F.R. § 399.110 (1990).

Before 1978, air carriers had not competed on the basis of price, and thus there had been little or no occasion for either federal or state monitoring of airfare advertising. But with the advent of decontrol, regulatory attention turned to that issue. In 1984, the CAB addressed a specific aspect of airfare advertising by regulation, determining that "the price stated [must be] the entire price to be paid by the customer." 14 C.F.R. § 399.84 (1990). When regulatory authority then passed from the CAB to DOT pursuant to the Sunset Act, DOT established "a consumer affairs office to resolve individual consumer complaints, including complaints about advertising." App. A, *infra*, at 3a. Since then, DOT has issued a series of orders pertaining to airfare advertising. In Order 85-12-68, DOT permitted the "international departure tax [to be stated] separately from other charges in advertisements and promotional materials." J.A. 39a. In Orders 88-3-25 and 88-8-2, DOT similarly permitted immigration fees and security surcharges to be stated separately. *Id.* at 41a, 45a.

Following invalidation of the latter two orders on procedural grounds, *see Alaska v. Skinner*, 868 F.2d 441 (D.C. Cir. 1989), DOT once again announced, in Order 89-4-25, that "we do not regard separate listing of these surcharges as an unfair or deceptive advertising practice." App. D, *infra*, at 27a n.1. In addition, DOT proposed regulations to codify its policies of permitting separate listing of various government-imposed or government-approved surcharges and of allowing the advertisement of "one-way fares that require round-trip purchases, provided that the advertisement indicates clearly that these fares are available only in conjunction with a round-trip purchase." 54 Fed. Reg. 31052, 31053 (1989). Such rules are appropriate, DOT explained, to avoid "placing any restrictions on the industry that are not

necessary and that would tend to limit airline price competition." *Id.* In proposing these rules, DOT stressed the importance of uniformity and the significance of federal preemption with respect to airfare advertising:

> To allow the 50 states to regulate price advertising and institute related enforcement proceedings would subject the carriers to inconsistent standards and thus seriously interfere with interstate commerce. . . .
>
> . . . [W]ithout a uniform policy, carriers would find it virtually impossible to put together nation-wide advertising programs that accurately portray the price of their services. Price competition would suffer, thus depriving consumers of lower fares.

Id. at 31054.

In the meantime, DOT "has enforced section 411 aggressively, primarily emphasizing consumer protection. . . . [As of August 1990, DOT] has issued some fifty orders to cease and desist under section 411 and has assessed civil penalties totaling more than one million dollars. Seven of these orders and nearly $100,000 of the civil penalties have concerned unfair or deceptive fare advertising by airlines. Additionally, [DOT] has resolved consumer problems in innumerable cases where enforcement action would not have been appropriate." App. E, *infra*, at 30a-31a. DOT also has "reached substantial settlements involving monetary restitution to consumers." App. F, *infra*, at 33a.

3. *Development of the NAAG Guidelines.* In December 1987, the National Association of Attorneys General ("NAAG"), dissatisfied with federal enforcement efforts, adopted its Air Travel Industry Enforcement Guidelines "as a statement of the general enforcement policy of the Attorneys General." National Ass'n of Attorneys General, *Resolution Adopting The Air Travel Industry Enforcement Guidelines* (March 1988), U.S. App. 7a ("U.S. App." refers to the appendix to the brief submitted by the United States at the petition stage in Nos. 90-1604

and 90-1606). These Guidelines purport to "explain in detail how existing state laws apply to air fare advertising." National Ass'n of Attorneys General, Task Force on the Air Travel Industry, *Guidelines and Commentary* (April 1988), U.S. App. 11a. The Guidelines set forth eight rules that, according to NAAG, state consumer protection laws require carriers, travel agents, and others to follow when advertising airfares:

> 1. "Any advertisement which provides air fares or other price information must be in plain language, clear and conspicuous, and non-deceptive. Deception may result . . . from omitting or obscuring a material restriction." U.S. App. 18a.
>
> 2. "Print advertisements for fares must make clear and conspicuous disclosure of restrictions such as:
>
> - Limited time availability.
> - Limitations on right to refund or exchange of ticket.
> - Time of day or day of week restrictions.
> - Length of stay requirements.
> - Advance purchase requirements.
> - Round trip purchase requirements.
> - Variations in fares to or from two or more airports serving the same metropolitan area.
> - Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled."

Id. at 18a-19a.

3. "Broadcast commercials for fares must make clear and conspicuous disclosure of:

- Limited-time availability.
- Limitations on right to refund or exchange of ticket."

In addition, disclosure of seven other types of restriction must be made "orally to the passenger before reservations are actually made." *Id.* at 21a-22a.

4. "Any billboard which provides air fare or other price information on a fare to which any material restrictions apply must have clear and conspicuous language such as 'Substantial restrictions apply.' The statement 'Restrictions apply' is not sufficient." *Id.* at 24a.

5. "Any advertised fare must be available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day for the market in which the advertisement appears, beginning on the day on which the advertisement appears and continuing for at least three days after the advertisement terminates.

However, if the advertised fare is not thus available, the advertisement must contain a clear and conspicuous statement of the extent of unavailability of the advertised fare.

Statements such as 'Seats limited' and 'Restrictions apply' do not meet this Guideline." *Id.* at 24a.

6. "Any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." *Id.* at 26a.

7. "If an airline elects to advertise the one-way portion of a fare that is only available as a round-trip purchase, this restriction together with the full round-trip fare, must be advertised in a clear and conspicuous manner, at least as prominently as the one-way fare." *Id.* at 26a-27a.

8. "A fare may be advertised by use of . . . words [such as] 'sale,' 'discount,' [and] 'reduced' . . . only if that fare is:

- available only for a specified, limited period of time, and

- substantially below the usual price for the same fare with the same restrictions." *Id.* at 27a.

Although stating the importance of "uniform guidelines," NAAG expressly disavowed any intention of actually imposing uniformity on its members: the Guidelines are "subject to the exercise of . . . individual prosecutorial discretion, and variations or supplementations to allow for . . . differences in individual state or common law." *Id.* at 6a-7a.

Prior to adopting the Guidelines, NAAG had circulated them to DOT and the FTC, among others, for comment. Both federal agencies criticized the Guidelines on the merits and strongly opposed their adoption. The FTC pointed out that because "extensive disclosure requirements . . . could severely curtail the price advertising in this industry," the Guidelines "could have the unintended consequence of substantially inhibiting effective price competition." App. A, *infra*, at 4a, 2a. DOT additionally objected that the Guidelines "appear to be preempted by the Federal Aviation Act . . . or [DOT] rules or would unduly burden interstate commerce." App. B, *infra*, at 12a.

4. *Events leading to this litigation.* In February 1988, the Attorneys General of Colorado, Kansas, Massachusetts, Missouri, New York, Texas, and Wisconsin announced that they intended to "bring . . . advertisements into compliance with the standards delineated in the [NAAG] guidelines for fare advertising." J.A. 123a. DOT responded that "we have specifically permitted the type of advertising to which the Attorneys General object" and asserted that "the Federal government has preempted this aspect of State price advertising regulation." *Id.* at 127a. Undeterred, the Attorney General of Texas, acting on behalf of the States of Texas, California, Massachusetts, New York, and Washington, wrote to, *inter alia*, respondents Trans World Airlines, Inc. ("TWA"), Continental Airlines, Inc. ("Continental"), and British Airways PLC ("British Air") in November

1988, "notifying them that some of their advertisements violated the NAAG guidelines and these states' false advertising and deceptive practices laws [including the Texas Deceptive Trade Practices Act] . . . [and] charg[ing] that the airlines had attempted to make their fares appear lower than those of their competitors by prominently advertising the ticket price, while less prominently disclosing taxes, surcharges and fees." Pet. App. 15a. In particular, the airlines were advised that "any fuel, tax or other surcharge to a fare must be included in the total advertised price of the fare." J.A. 185a. The airlines were directed to comply with the NAAG Guidelines, and thus to abandon a form of advertising expressly permitted by DOT, on pain of prosecution under state law.

5. *Litigation in the district court.* Faced with this ultimatum, TWA, Continental, and British Air brought suit in the United States District Court for the Western District of Texas, seeking to enjoin the Attorney General of Texas from enforcing the NAAG Guidelines under cover of the Texas Deceptive Trade Practices Act. J.A. 3a. Jurisdiction rested on 28 U.S.C. §§ 1331 and 1337. *Id.* at 2a. Following a hearing, the district court determined that the airlines had established the likelihood of success on the merits of their claim that the threatened enforcement actions were barred by section 105(a)(1) of the Deregulation Act. Consequently, the court found it unnecessary to reach the airlines' alternative contentions that state enforcement of the NAAG Guidelines "constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the constitutional prohibition against interstate compacts . . .; or violates [the airlines'] First Amendment rights." Pet. App. 49a. Because the airlines also had satisfied the other requirements for preliminary injunctive relief, the court preliminarily enjoined the Attorney General of Texas, and also the attorneys general of thirty-three other states who had intervened as defendants, from

enforcing the NAAG Guidelines in the guise of state consumer protection law. *Id.* at 49a-50a.

6. *The first appeal.* The Fifth Circuit affirmed, reasoning that "state laws pertaining to deceptive advertising have been expressly preempted by federal law when applied to fare advertising by interstate and international airlines." Pet. App. 23a. The court began by noting that section 105(a)(1) of the Deregulation Act preempts all state laws "relating to rates, routes, or services," and that this Court has held that a state law "relates to" a subject, as that term is used in a preemption statute, if it "has a connection with or reference to" the subject. *Id.* at 26a, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983). The court further noted that the Seventh Circuit earlier had concluded that "[p]ricing advertising surely 'relates to' price" and that other courts had reached similar conclusions concerning the reach of section 105(a)(1). *Id.* at 26a-28a, citing *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990); *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987); and *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984).

The court then reviewed the legislative history of section 105(a)(1) and determined that it "demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only." Pet. App. 31a. In addition, "[s]ubsequent legislation has confirmed the intent of Congress to preempt state regulation of airline fare advertising." *Id.* at 32a. Because "enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1) . . . such state action is expressly preempted." *Id.* at 33a. This Court denied certiorari on October 15, 1990. 111 S.Ct. 307, 308 (1990).

7. *Entry of final judgment and the second appeal.* After the Fifth Circuit affirmed the award of preliminary relief, the district court granted summary judgment for the airlines; issued a permanent injunction; and entered final judgment. Pet. App. 10a. The Fifth Circuit, relying upon its earlier opinion, affirmed *per curiam*. *Id.* at 1a.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Introduction

1. This case arose as a dispute over threatened enforcement of the NAAG Guidelines. The Attorneys General of Texas and certain other states demanded that airlines "bring their advertisements into compliance with the standards delineated in [those] guidelines," J.A. 123a, and, in particular, with the requirement that "[a]ny fuel, tax, or other surcharge . . . be included in the total advertised price of the fare." *Id.* at 124a. When the airlines, relying upon DOT Order 85-12-68, refused to accede to that demand, the attorneys general "reaffirmed the position of the states regarding fare surcharges in advertisements," *id.* at 112a, and threatened to secure compliance by bringing suit under their "respective state consumer protection laws." *Id.* at 115a.

In response, the airlines brought this suit against the Attorney General of Texas to "enjoin[] and restrain[] the implementation of the [NAAG] Guidelines . . . through enforcement of [the Texas Deceptive Trade Practices—Consumer Protection Act]." J.A. 3a. They asked that the Attorney General be enjoined "from taking any action against plaintiffs pursuant to [that Act] or any other state law in conjunction with the NAAG Guidelines as they purport to regulate plaintiffs' . . . advertising of their rates, routes and services." *Id.* at 24a. *See also id.* at 10a-15a.

The district court issued the injunction upon finding that the airlines would suffer immediate and irreparable injury if an enforcement action was brought against them "in accordance with the [NAAG] Guidelines . . . on account of [their] air fare advertising." Pet. App. 48a-49a. The court subsequently permitted joinder and enlarged the injunction to include certain other attorneys general who "are attempting to use state law to enforce the NAAG guidelines relating to airline advertising." *Id.* at 60a.

The states have chosen in this Court to characterize the scope of the injunction broadly. They imply that they are precluded, for example, from enforcing laws of general applicability that prohibit advertisers from making false statements of fact. *E.g.*, Texas Br. 29-30. But that is not what this case is about. The issue here is narrow, specific, and concrete. It arises from and concerns only the states' threatened attempts to enforce the detailed, industry-specific restrictions that the NAAG Guidelines place solely on the advertising of airfares.

The NAAG Guidelines are narrowly drawn to regulate *only* the airline industry. They are not rules of general application; they do not apply to the advertising of prices by any other industry or group of sellers. The states have singled out the airline industry for special attention and have subjected that industry to exhaustive special rules. Those rules specify in elaborate detail precisely what airlines may and may not say when advertising their airfares. The Guidelines thus represent the states' concerted effort to micromanage the advertising of airfares on a nationwide basis. That effort cannot be squared with the Deregulation Act.

2. Section 105(a)(1) of the Deregulation Act provides that "no State . . . shall enact or enforce any law . . . standard, or other provision having the force and effect of law relating to rates, routes, or services." The statutory language suggests two different questions pertinent to this case: (1) whether the NAAG Guidelines "relat[e] to rates;" and (2) whether those Guidelines constitute either "law" or "standard[s], or other provision[s] having the force and effect of law." The second of these two questions need not detain us for long.

The NAAG Guidelines are not law in the same sense that a common law rule, statute, or lawfully promulgated regulation is law; they have not been adopted by any court, enacted by any legislative body, or promulgated by any administrative agency acting with properly delegated authority. The Guidelines nevertheless "serve as instruments of regulation." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69 (1963). The states seek to enforce the Guidelines as if they have been incorporated by legislative action into existing consumer protection law—to treat the Guidelines, in other words, as "standard[s], or other provision[s] having the force and effect of law." Congress foresightedly included such standards and provisions within the ambit of section 105(a)(1) in order to prevent the states from evading federal preemption through the use of novel devices such as the NAAG Guidelines. Under section 105(a)(1), state rules, whether labeled laws or merely guidelines, cannot be enforced—cannot be given the force and effect of law—if they "relat[e] to rates."

The sole issue in this case, therefore, is whether detailed rules specifying what airlines may and may not say when advertising their rates "relat[e] to [those] rates" within the meaning of section 105(a)(1). They do.

B. Summary Of Argument

1. Congress used virtually the same language of preemption in section 105(a)(1) that it had used four years earlier in section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1988). In construing the latter pro-

vision, this Court has explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with or reference* to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (emphasis added). Similarly, a law "relat[es] to rates," in the normal sense of the phrase, if it has a connection with or reference to rates.

As under ERISA, the Court "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restricted meaning." *Shaw*, 463 U.S. at 97. There is none. To the contrary, Congress "reject[ed] more limited preemption language," *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990), that would have preempted only laws "determining" rates, routes, and services. Other provisions of the statute, preserving the states' ability to exercise certain proprietary rights and to impose certain taxes, were included precisely because Congress understood that it had used broad-sweeping language of preemption.

2. The NAAG Guidelines have an intimate connection with and make explicit reference to the rates airlines charge. Their connection with rates is pervasive and may be demonstrated with a single example. The Guidelines require an advertised fare to be "available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day . . . for at least three days after the advertisement terminates." U.S. App. 24a. This restriction places a substantive limitation on an airline's ability to determine what fares it will charge and, as the FTC has pointed out, is likely to "reduce the number of discount seats that airlines now offer consumers." App. A, *infra*, at 7a. In addition, the Guidelines are replete with references to rates. Each one of the rules here at issue refers specifically and expressly to the rates charged by air carriers. These are, manifestly, rules "relating to rates" within the meaning of section 105(a)(1).

The states argue that section 105(a)(1) should be read as preempting only "utility-type regulation." *E.g.*, Texas Br. 14. Although such a narrow reading is difficult to square with the literal text of the statute, it is broad enough to doom the NAAG Guidelines. State public utility commissions commonly are responsible for prescribing detailed rules governing the manner in which regulated utilities advertise their rates. *See, e.g.*, 16 Tex. Admin. Code § 23.28(k) (1988). The NAAG Guidelines provide a perfect example of just such utility-type regulation and thus fall well within even the states' own description of what has been preempted.

3. Construing section 105(a)(1) in accordance with its "broad common-sense meaning," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), best effectuates the deregulatory policy of the statute as a whole. The overriding objective of the Deregulation Act was to replace regulation with the free interplay of competitive market forces. The NAAG Guidelines clash with that objective.

DOT is charged with regulatory responsibility for protecting against unfair and deceptive practices in a manner that also fosters vigorous and effective price competition. The states do not share this dual responsibility, and the rules they have propounded discourage the very efficiency, innovation, and low prices that Congress sought to foster. *See* Deregulation Act § 102(a)(9), 49 U.S.C. § 1302(a)(9).

The NAAG Guidelines arbitrarily prohibit advertising formats that are beneficial to advertisers and consumers alike. By imposing burdensome requirements on advertising content, they are likely to cause a reduction in airfare advertising generally, and especially in the advertising of sharply discounted restricted fares. Because "[a]n airline would have little incentive to reduce fares if it could not advertise them," App. A, *infra*, at 5a, the Guidelines are likely to lead to fewer bargain fares and thus higher

rates overall. *See* App. A, *infra*, at 7a; 54 Fed. Reg. at 31054.

The states of course disagree with the conclusion that the NAAG Guidelines could force prices higher. But they make no secret of the fact that their objective is indeed to work a change in airlines' rates and rate structures. The states hope to pressure air carriers into "dropping the conditions they would otherwise have to disclose or simplifying those conditions in conformance with the NAAG enforcement Guidelines." *Report and Recommendations of NAAG Task Force on Air Travel Industry*, 53 Antitrust & Trade Reg. Rep. No. 1345, at S-6 (Dec. 17, 1987). This objective, of course, is squarely contrary to Congress' purpose in enacting the Deregulation Act. Industry-specific state regulations dictating what airlines can and cannot say when advertising their rates simply have no place in the deregulated, freely competitive marketplace that Congress envisioned. Such regulations "relat[e] to rates" and thus are expressly preempted.

4. Immediately after enactment of the Deregulation Act, the CAB read section 105(a)(1) as its mandate to "occupy the entire field of economic regulations." 44 Fed. Reg. at 9948. When regulatory jurisdiction over the airline industry later was transferred from the CAB to DOT, Congress confirmed the importance of a continuing and exclusive federal jurisdiction, noting in particular that varying state regulations with respect to consumer protection would be "confusing and burdensome to airline passengers, as well as to the airlines." H.R. Rep. No. 793 at 4. DOT responded to this congressional concern by making explicit what previously had been implicit: section 105(a)(1) "dictate[s] that there be one industry-wide price advertisement standard." 54 Fed. Reg. at 31054.

The NAAG Guidelines repudiate the assertion of exclusive federal jurisdiction and defeat the express congressional objective of uniformity. They establish standards in competition and potential conflict with those DOT may adopt; they directly conflict with DOT Order 85-12-68; and they expressly hold out the prospect of non-uniformity and conflict among the states themselves. This is contrary to the express legislative intent that there should be one "legal standard uniform nationwide." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754-55 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990).

ARGUMENT

THE NAAG GUIDELINES "RELAT[E] TO RATES" WITHIN THE MEANING OF SECTION 105(a)(1) OF THE DEREGULATION ACT

Section 105(a)(1) of the Deregulation Act precludes enforcement of state rules "relating to [airline] rates." The states argue that section 105(a)(1) does not preempt "general consumer protection laws" that are not "directed at airline practices in particular." Texas Br. 12. That argument misses the point. It is the states' threatened enforcement of the new industry-specific standards contained in the NAAG Guidelines, not the routine enforcement of general consumer protection laws, that gives rise to the question of preemption in this case. The NAAG Guidelines undeniably are directed at airline practices in particular. By their own terms, the Guidelines apply exclusively to "the advertising and marketing practices of the airline industry." U.S. App. 10a.

The NAAG Guidelines establish special rules governing precisely what airlines may and may not say when advertising their rates, routes, and services. In establishing such rules, the Guidelines go far beyond the broad prohibitions of general consumer protection laws. They specify, for example, the restrictions that must be disclosed, and those that need not be disclosed, in various types of advertising; they forbid the use of general cau-

tionary statements such as "restrictions apply;" they dictate the inclusion of various federal taxes and surcharges in the advertised price; they place substantive limitations on the use of such words as "sale;" and they impose other requirements unique to the airline industry. *See* pp. 10-12, *supra*. They even specify the size of type that may be used in disclosing restrictions, *see* U.S. App. 13a, with the admission that "NAAG singled out airline advertisements for this treatment." *Id.* at 15a. The Guidelines thus constitute a detailed regulatory template specifically for the advertising of airfares. By no stretch of the imagination can they be described as general consumer protection laws.

The states' invocation of general law as a basis for enforcing the NAAG Guidelines is a sham. The very statute on which Texas here purports to rely, like the consumer protection statutes of more than twenty other states, specifically cross-references to and incorporates consumer protection standards adopted by the FTC. *See* Tex. Bus. & Comm. Code Ann. § 17.46(c)(1); App. C, *infra*, at 20a. Yet the FTC itself consistently has opposed the Guidelines. *Id.* at 18a-19a. The FTC has pointed out, moreover, that the NAAG report leading to the adoption of the Guidelines "contains virtually no discussion in support of the conclusion that advertising which fails to conform [to the] requirements is unfair or deceptive under state law . . . [and] does not cite a single court decision finding unfairness or deception in the practices the Guidelines would discourage." *Id.* at 19a. NAAG offers no grounds for believing "that the failure of an advertisement to meet a particular requirement would thereby render the advertisement deceptive or unfair even under the broadest state statutory provision." *Id.* at 21a.

These considerations support the charge, leveled by the former Attorney General of New Mexico, Hal Stratton, that NAAG is using general consumer protection

laws as a pretext for subjecting airlines to unlegislated special rules. As Stratton has written, NAAG's members "are using the cover of 'consumer protection' to impose their own anti-business, pro-government-regulation views on the entire nation and are bypassing the legislative process to put in place 'enforcement guidelines' that Congress itself refuses to pass." Hal Stratton, "Attorneys General In Collusion," *Wall St. J.*, June 10, 1988, at 22, col. 4. This effort to engraft industry-specific special rules onto the body of general consumer protection law is unavailing. General law may not be used as protective cover for a state regulatory program that, if enacted separately, would be preempted. *Cf. Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). States cannot "do indirectly what they could not do directly." *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

The narrow issue in this case is whether rules drawn specifically to regulate the manner in which airline rates may be advertised "relat[e] to [those] rates" within the meaning of section 105(a)(1) of the Deregulation Act and thus are preempted. The Court can and should reject the states' invitation to inquire more broadly into whether section 105(a)(1) also preempts general consumer protection rules, such as a prohibition against false statements of fact, that apply equally to all sellers and are not targeted solely at air carriers. "The full scope of the preemptive effect . . . [can] remain[] to be fleshed out on a case-by-case basis." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). It is sufficient for present purposes to resolve the specific dispute concerning the states' threatened enforcement of the NAAG Guidelines.

To be sure, resolution of this dispute will leave room for disagreement in future cases. For example, a state might promulgate a rule requiring all sellers, and not only air carriers, to caution not just that "restrictions

apply" but that "other substantial restrictions apply." *See* U.S. App. 22a. If the state then sought enforcement only against advertisers of airfares, the situation would be essentially the same as in this case. But if the state in fact sought enforcement against sellers of other products and services, without discriminating against air carriers, it would become necessary to consider whether the Deregulation Act forbids application of a truly general rule of that kind to the advertising of airfares. *Cf. Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 n.11 (1988) (distinguishing between general "blue sky" law and industry-specific regulation). But that is not the problem in this case. The states, through their attorneys general, have devised a special set of detailed rules that on their face apply only to the advertising of airfares. The Deregulation Act preempts this deliberate effort by the states to subject air carriers to a unique set of industry-specific rules.

I. THE DEREGULATION ACT HAS THE SAME BROAD PREEMPTIVE SWEEP AS ERISA

"[T]he question whether a certain state action is preempted by federal law is one of congressional intent." *Allis-Chalmers Corp.*, 471 U.S. at 208. Here, the congressional intent to preempt is unequivocal: section 105(a)(1) of the Deregulation Act explicitly bars the states from enacting or enforcing "any law . . . relating to rates, routes, or services of any air carrier." The question in this case, therefore, is not whether Congress intended to preempt, but the scope of the intended preemption.

In determining the scope of preemption under section 105(a)(1), the Court "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). The language Congress used in section 105(a)(1) is virtually identical to the language it had used four years earlier in section 514(a) of ERISA, preempting state laws that "relate to any employee benefit plan." In construing section 105(a)(1), therefore, it is appropriate to turn to the series of cases in which the Court has construed and applied the ERISA preemption statute.

The Court noted in those cases that where "Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute . . ., our task of discerning congressional intent is considerably simplified." *Ingersoll-Rand*, 111 S. Ct. at 482. The ERISA preemption statute, the Court noted, is "conspicuous for its breadth," *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990), and "deliberately expansive." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). The Court concluded that "[t]he phrase 'relate to' [should be] given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan . . . if it has a connection with or reference to such a plan." *Metropolitan Life Ins.*, 471 U.S. at 739, quoting *Shaw*, 463 U.S. at 97.

This case is essentially the same. The Deregulation Act is "new, comprehensive legislation which entirely overhauls the aviation regulatory system." H.R. Conf. Rep. No. 1779 at 56. The key to section 105(a)(1), as to the ERISA preemption statute, "is found in the words 'relat[ing] to.'" *Ingersoll-Rand*, 111 S. Ct. at 482. The words "relating to" should be given the same broad common-sense meaning in section 105(a)(1) that they have in ERISA "unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97. Consistency in construction, giving the same words the same meaning when used in the same way in similar statutes, serves a very practical end: only thus can Congress be assured of achieving the result that it intends to accomplish through its use of those words.

Section 105(a)(1) should be construed consistently with the ERISA preemption statute. There is no good reason to believe that Congress intended the phrase "relating to" to be given a more restrictive meaning in section 105(a)(1) than in ERISA. In the Deregulation Act, as in ERISA, "Congress used those words [*i.e.*, 'relating to'] in their broad sense, rejecting more limited pre-emption language." *Ingersoll-Rand*, 111 S. Ct. at 482. If Congress had intended only limited preemption along the lines that the states now suggest, it would have used language more narrowly tailored to accomplish that result. For example, Congress could have barred the states from "determining" or "regulating" rates, routes, and services. But it deliberately chose not to do so.

The preemption clause contained in the Senate bill did bar the states from "*determining* routes, schedules, or rates, fares, or charges." S. Rep. No. 631 at 39 (emphasis added). But it did not stop there. It proceeded additionally to bar the states from "otherwise promulgat[ing] economic regulations for, any air carrier." *Id.* The Senate bill thus not only barred the states from asserting direct regulatory control over rates, routes, and services but also prohibited them from subjecting air carriers to any other form of economic regulation. That also is the meaning of section 105(a)(1) as enacted. The House simply condensed the two-part Senate provision into the single catch-all phrase "*relating* to rates, routes, and services," without the slightest suggestion that any change in substance was intended. H.R. Conf. Rep. No. 1779 at 4. This understanding of the legislative history was confirmed when, immediately upon enactment, the CAB construed section 105(a)(1) as preempting "the entire field of economic regulations." 44 Fed. Reg. at 9948. *See* pp. 40-41, *infra*.

The states contend that section 105(a)(1) should be read as prohibiting them only from "stepp[ing] into the

breach" left by federal deregulation, *i.e.*, from asserting the specific regulatory powers over rates, routes, and services that were being relinquished by the federal government. Texas Br. 15; 31 States Br. 10. But they offer as support for that contention the section-by-section analysis of a very different earlier bill that did not survive the legislative process; and even that analysis reveals an intention to preempt more broadly than the states are willing to admit. *See* 123 Cong. Rec. 30595-96 (1977). *Amicus* Public Citizen and Aviation Consumer Action Project similarly relies upon the fact that the CAB, when commenting on an even earlier bill, had suggested that a preemption provision similar in wording to section 105(a)(1) would merely "codif[y] . . . existing law." Public Cit. Br. 16, quoting *Aviation Regulatory Reform: Hearings before the Aviation Subcomm. of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 243 (1977). Those comments on a different and earlier bill—comments diametrically opposed to the CAB's own subsequent construction of section 105(a)(1)—provide no proper guidance to the scope of preemption under the Deregulation Act. It is incontestable that Congress did not mean merely to codify existing law in section 105(a)(1). Both the House and the Senate stated unequivocally that section 105(a)(1) would change existing law; they pointed out, for example, that it would divest the states of their pre-existing regulatory authority over the intrastate activities of interstate air carriers. H.R. Rep. No. 1211 at 15-16; S. Rep. No. 631 at 98-99. Plainly, Congress was doing more than just preventing the states from filling the void left by federal deregulation.

Moreover, the Deregulation Act itself provides internal evidence that preemption was intended to sweep far more broadly than the states now claim. For example, Congress found it necessary to preserve the states' ability to exercise limited "proprietary powers and rights . . . as the owner or operator of an airport." Deregulation

Act § 105(b)(1), 49 U.S.C. app. § 1305(b)(1). Congress similarly found it necessary to preserve the states' ability to impose certain "sales or use taxes on the sale of goods or services." Deregulation Act § 1113(b), 49 U.S.C. app. § 1513(b); *see also Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986). Such explicit preservation of state authority would have been unnecessary if the preemption clause were as narrow as the states would have this Court believe.

For all these reasons, section 105(a)(1) should be read, in harmony with the similarly worded ERISA preemption provision, as prohibiting the states from enforcing any rule having a connection with or reference to rates, routes, or services. The NAAG Guidelines fall well within that prohibition.

II. THE NAAG GUIDELINES HAVE A CONNECTION WITH AND REFERENCE TO THE RATES AIRLINES CHARGE

The NAAG Guidelines have an obvious and pervasive connection with the rates airlines charge. The Guidelines represent the states' deliberate regulatory response to the new deregulatory environment mandated by Congress, under which for the first time airfares are competitively determined and competitively advertised. By prescribing what the airlines can and cannot say about their rates, the Guidelines necessarily and directly affect the rates themselves. This point is developed further below. *See* pp. 32-40, *infra*. For present purposes, it is sufficient to furnish a single example.

The Guidelines require an advertised fare to be "available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day . . . for at least three days after the advertisement terminates." U.S. App. 24a. On its face, this requirement places an explicit substantive limitation on an airline's ability to

determine what rates it will charge. Although the Guidelines permit the airline, as an alternative, to furnish "a clear and conspicuous statement of the extent of unavailability of the advertised fare," they preclude the use of such understandable expressions as "seats limited." *Id.* The net effect of this rule is to restrict an airline's ability to establish and then advertise sharply discounted fares that are available only for a limited time or for a limited number of seats.

The FTC has explained at some length how this requirement of the NAAG Guidelines will inevitably, directly, and adversely affect the rates airlines can charge and the number of seats they are able to make available at those rates:

> This requirement could substantially reduce the number of discount seats that airlines now offer consumers. Airlines currently employ extremely sophisticated computer programs to allocate fares on a flight-by-flight, day-by-day basis under "yield management" systems designed to ensure that each flight takes off with as many seats filled as possible. Under this system, airlines continuously analyze the demand for seats on each flight and alter the mix of different fares in order to fill the flight. The number of seats available at different fares can change up to the departure of the flight. As a result, the number of seats allocated at a particular discount fare may be taken 10 days before a flight, but cancellations or a change in demand may result in additional discount seats becoming available two days before departure. Similarly, seats on flights departing at off-peak times may be offered at deeper discount fares in order to attract more customers. Moreover, fare adjustments are also made in order to meet competition from other airlines.
>
> The complexity of the yield management pricing system is virtually impossible to explain in advertising. The flexibility to respond to demand by adjust-

> ing prices to fill each flight would be lost under the more static seat allocation program the task force's guidelines could impose. Depriving airlines of the necessary flexibility to offer deeply discounted fares will raise the cost of airline service while significantly restricting consumers' access to low fare air travel.

App. A, *infra*, at 7a-8a (footnote omitted); *see also* App. B, *infra*, at 14a-15a.

Considerations such as these led DOT to conclude that the overall "effect of the Guidelines would be to materially diminish the ability of airlines to advertise discount restricted fares." App. B, *infra*, at 13a. Sharply reduced fares that cannot be effectively advertised will not serve their purpose of attracting marginal customers who otherwise would not travel or would travel by some other means or carrier. The natural consequence will be to discourage airlines from offering these fares at all: "[a]n airline would have little incentive to reduce fares if it could not advertise them." App. A, *infra*, at 5a. The Guidelines' connection with rates, therefore, is manifest.

The NAAG Guidelines also have reference to rates and, specifically, to the rates charged by air carriers. This distinguishes the Guidelines from general rules of consumer protection that do not target the sellers in a single industry. *Cf. Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (distinguishing between a state anti-garnishment statute narrowly tailored to govern pension benefits and a state garnishment statute of general applicability). The Guidelines themselves are replete with references specifically to airfares. Each one of the eight rules here at issue expressly refers to airline rates. *See* pp. 10-12, *supra*.

This case is, in this respect, very much like *Ingersoll-Rand*. There, a state common law rule had permitted a terminated employee to recover for wrongful discharge if

he could show that his employer was motivated by a desire to avoid contributing to or paying benefits under a benefit plan. 111 S. Ct. at 481. This did not directly interfere with the employer's decisions concerning whether to have a plan, what the terms of the plan would be, or how it would be administered. *Id.* at 484. But because the state rule directly referred to benefit plans and made the existence of a plan central to recovery, it was preempted by ERISA. *Id.* at 483. The NAAG Guidelines similarly depend on the existence of and explicitly refer to airfares. The Guidelines are, indeed, single-mindedly focused on what airlines can and cannot say about their rates. They have reference to almost nothing but rates.

In short, as the Fifth Circuit correctly concluded, "[i]t cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates." Pet. App. 33a. Because the NAAG Guidelines have an intimate connection with and make explicit reference to rates, they "relat[e] to" rates within the plain meaning of section 105(a)(1).

The states argue, however, that Congress intended to preempt only "utility-type regulation," *see, e.g.*, Texas Br. 14, a phrase they borrow from testimony given by a CAB official during a legislative hearing on the bill. *See* 31 States Br. 14. Such a narrow reading is difficult to square with the plain meaning of the statutory text. Be that as it may, the Guidelines could not pass muster even under the states' proposed standard of preemption. Whatever else "utility-type regulation" may mean, it surely encompasses industry-specific regulation of the type characteristically imposed by state public utility commissions; and those commissions commonly are responsible for prescribing rules governing the manner in which regulated utilities advertise their rates. For example, the Texas Public Utility Commission has promulgated regulations governing the advertising of promotional rates by local exchange carriers, requiring that such advertising

"shall clearly describe the temporary nature of the rate, the date on which the promotional rate will expire, and the rate which will apply after expiration of the promotional rate." 16 Tex. Admin. Code § 23.28(k) (1988). This is precisely the kind of detailed control over advertising that the states are seeking to exert through enforcement of the NAAG Guidelines. The NAAG Guidelines therefore not only have a connection with and reference to airline rates but also furnish a perfect example of the kind of utility-type regulation that the states themselves concede section 105(a)(1) preempts.

The states' counter-argument that section 105(a)(1) and the savings provision, section 1106, "must be read together," Texas Br. 14, is an obvious makeweight. Reading those statutes together does not assist the states. Section 105(a)(1), the later-enacted provision, "is a clear indication of congressional intent to preempt and is controlling." *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989). Indeed, it is by no means clear that section 1106, which was enacted in 1938 to save those state remedies "now existing," would have any application at all to newly devised rules like the NAAG Guidelines. But whatever breadth section 1106 may have had previously, it now acts to preserve only those state remedies that section 105(a)(1) does not preempt, *i.e.*, remedies *not* "relating to rates, routes, or services." The NAAG Guidelines, which do "relat[e] to rates" even under the standard proposed by the states, fall well within the ambit of section 105(a)(1) and thus are beyond the reach of section 1106.

III. THE NAAG GUIDELINES RUN COUNTER TO THE DEREGULATORY POLICY OF THE STATUTE AS A WHOLE

In determining the scope of preemption under section 105(a)(1), it is appropriate to "'"look to the provisions of the whole law, and to its object and policy."'" *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986), quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956), in turn quoting *United States v. Heirs of Boisdore*, 8 How. 113, 122 (1849). That inquiry confirms that section 105(a)(1)'s "pre-emptive scope [is] as broad as its language." *Shaw*, 463 U.S. at 98. Giving section 105(a)(1) its "broad common-sense meaning," *Metropolitan Life Ins.*, 471 U.S. at 739, best effectuates the deregulatory policy of the statute as a whole.

The overriding objective of the Deregulation Act was to replace regulation with the free interplay of competitive market forces and thereby "allow competition and the marketplace to determine rates and practices in the air transport industry." *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Great Western Airlines, Inc.*, 767 F.2d 425, 427 (8th Cir. 1985). This message comes over loud and clear both in the statutory text and in the legislative history. The declaration of congressional policy, in section 102(a)(4) and (9), calls for the "placement of maximum reliance on competitive market forces and on actual and potential competition" and for "development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services."

The congressional objective was accomplished, in the main, by withdrawing from the CAB its historic authority to determine rates and approve routes. The CAB was instructed, instead, "to allow prices, route structures, and the nature and variety of air services to be set by the independent forces of the free market and airline management decisions, rather than by the Board itself." S. Rep. No. 631 at 5. Congress sought to ensure that "price competition will be a permanent reality in domestic air transportation." *Id.*

At the same time, Congress recognized that it was incumbent on the federal government to safeguard the integrity of those market forces on which maximum reli-

ance was being placed. Referring implicitly to the CAB's existing authority under section 411(a) of the FAA Act to protect against "unfair or deceptive practices or unfair methods of competition," Congress reemphasized in section 102(a)(3) and (7) of the Deregulation Act that the CAB had a duty to prevent "unfair or deceptive practices" and "unfair, deceptive, predatory, or anticompetitive practices in air transportation." The CAB was armed with authority not only to issue orders to cease and desist but also to impose civil penalties and seek imposition of criminal sanctions. *See* FAA Act §§ 901 and 902 (codified as amended, 49 U.S.C. app. §§ 1471 and 1472).

Regulatory jurisdiction over the airline industry passed from the CAB to DOT in 1984. *See* section 3(b) of the FAA Act (codified as amended, 49 U.S.C. app. § 1551(b)). Like the CAB before it, DOT is charged with the dual responsibility of freeing the airlines from nonmarket constraints while at the same time protecting consumers against unfair and deceptive practices. This means that DOT must exercise its authority over consumer protection in a manner that remains sensitive to the important objective of encouraging efficiency, innovation, and low prices through maximum reliance on competitive market forces. Consequently, in determining whether a particular practice is unfair or deceptive DOT gives careful consideration to the economic forces at work in the airline industry, and it attempts to avoid "placing any restrictions on the industry that are not necessary and that would tend to limit airline price competition." 54 Fed. Reg. at 31053. This reflects the correct understanding that robust price advertising is essential to effective price competition. *See, e.g., Bates v. State Bar*, 433 U.S. 350, 577 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

DOT's regulation of airfare advertising is responsive to the fact that the economics of a competitive airline industry dictate the adoption of complex and flexible pric-

ing structures. Airlines face economic constraints that are quite different from those encountered in most industries. Air carriers have very high fixed costs, and even their variable costs (such as fuel) are rarely directly attributable to any one class of service or passenger. Transportation Research Board National Research Council, *Winds of Change: Domestic Air Transport Since Deregulation* 89-92, 135 (1991). As a consequence, the marginal cost of carrying an additional passenger is negligible, even though the average cost may be quite high. *Id.* at 94-95. Moreover, most carriers operate with substantial excess capacity overall but may face heavy demand for some flights or during particular times of the year. *Id.* at 92-97. Business travelers typically have a need for air travel that is relatively insensitive to price but highly sensitive to scheduling constraints and the availability of seats on short notice. *Id.* Nonbusiness travelers, on the other hand, typically are more concerned about price but also are more flexible with respect to scheduling. *Id.*

All of these factors play a role in determining airfares. Airlines seek to recover their costs by implementing a multi-tier pricing structure, pursuant to which higher fares are charged to travelers with an inelastic demand for air travel and lower fares are charged to other travelers in order to fill seats that otherwise might remain empty. *Id.* Such a pricing structure is achieved by imposing restrictions on lower-priced tickets that make them less attractive or even unavailable to customers who need, for example, to travel on short notice, or on a particular day, or at a particular time. *Id.* By offering a variety of fares, each accompanied by a particular set of restrictions, airlines attempt to maximize revenues in relation to their relatively fixed operating costs. *Id.*

Lower fares, to serve their purpose of attracting passengers to fill otherwise empty seats, must be advertised. This poses a practical problem. The proliferation of fares and accompanying restrictions makes it difficult to convey the full complexity of the fare structure in an adver-

tisement that remains both short and understandable. Recognizing this difficulty, DOT has sought to strike an appropriate balance, permitting advertising formats appropriate to the economic realities of the airline industry while at the same time assuring that consumers will not be deceived. The moral imperatives of the NAAG Guidelines threaten to upset this balance. They discourage the very "efficiency, innovation, and low prices" that Congress sought to foster. *See* Deregulation Act § 102(a)(9) of the Act, 49 U.S.C. app. § 1302(a)(9).

The NAAG Guidelines insist that "[a]ny . . . tax, or other surcharge . . . must be included in the total advertised price of the fare." U.S. App. 26a. In contrast, DOT's proposed regulation, enlarging upon Order 85-12-68, would permit airlines to advertise fares net of "U.S. and foreign departure taxes, security charges, customs fees, immigration fees," and other similar government-imposed or government-approved surcharges. 54 Fed. Reg. at 31055. DOT has explained that requiring each airline to advertise a single fare that included all taxes and other related charges would "tend to limit airline price competition," because "[t]he specific charges that would be permitted to be listed separately either are limited, or apply only in certain markets or for certain flights, thus making it difficult or impossible to publi[s]h advertisements with one way and round-trip fares to multiple destinations and include charges in single advertised rates." *Id.* at 31053. This problem would become acute with the implementation of new federally-approved passenger facility charges of up to $3 per airport. *See* 56 Fed. Reg. 24254 (1991). Such charges alone can make a round-trip fare vary by as much as $12, depending on the airports used. *Id.*

In addition, the NAAG Guidelines require advertisement of "the full round-trip fare." U.S. App. 27a. DOT, on the other hand, would permit "[o]ne-way fares that are available as part of a round-trip purchase [to] be advertised separately." 54 Fed. Reg. at 31055. DOT's proposal is "consistent with existing practice which the Department has not found to have caused any confusion in the past." *Id.*

Beyond these two specific differences between DOT's proposals and the NAAG Guidelines, there is a fundamental difference in philosophy. DOT recognizes that an advertisement is not a contract but an invitation to do business. Both DOT and the FTC understand that "[t]he goal of most advertising for discount airfares is to signal that bargain prices are available and suggest that consumers inquire further when they contact a travel agent or airline to make specific travel plans." App. A, *infra*, at 5a. They believe that advertisements need not "describe every contractual restriction or limitation," that it is sufficient "to alert the customer that certain important kinds of restrictions and limitations exist." App. B, *infra*, at 14a; *see also* App. C, *infra*, at 22a. In contrast, "the Guidelines would, in effect, force carriers to place their extensive and detailed contracts of carriage in advertisements." App. B, *infra*, at 13a. The Guidelines require newspaper and magazine advertisements to advise the consumer of almost every conceivably relevant restriction in detail, even though it traditionally has been the responsibility of travel agents or airline reservation agents to provide such particularized assistance. App. A, *infra*, at 6a-7a. As the FTC has pointed out, "[a]dvertising restrictions such as those . . . would make it very costly to advertise present fare structures in print." *Id.* at 5a.

The NAAG Guidelines' onerous demands are likely to lead to a decrease in overall airfare advertising and, in particular, in the advertising of discounted fares. *See* J.A. 56a, 58a; App. B, *infra*, at 13a. Indeed, there already is evidence that "some airlines have reduced or eliminated their advertising of discount fares on television because of the disclosure requirements of the Guidelines."

App. C, *infra*, at 19a. Inability to advertise effectively will severely impair airlines' ability to offer the complex and flexible fare structure that the economics of the newly deregulated airline industry demand. As one airline marketing executive has warned, "the inhibitions placed on price advertising by the states could actually inhibit the availability of innovative or discount fares designed to attract the most price-sensitive travelers." J.A. 90a.

In short, the NAAG Guidelines impair airlines' ability to establish fares and fare structures that reflect and respond to competitive market forces. Indeed, the states make no secret of the fact that they intend directly to affect "the terms and conditions of discount airline fares as well as the advertising of those fares." App. C, *infra*, at 24a. The states acknowledge that, by requiring elaborate specification of applicable travel restrictions, they hope to pressure the airlines into "dropping the conditions they would otherwise have to disclose or simplifying those conditions in conformance with the NAAG enforcement Guidelines." *Report and Recommendations of NAAG Task Force on Air Travel Industry*, 53 Antitrust & Trade Reg. Rep. No. 1345, at S-6 (Dec. 17, 1987). The states presumably expect the airlines nonetheless to continue to offer the same attractively low fares to which those conditions had been attached. In the same vein, by requiring all taxes and surcharges to be included in the total advertised fare, the states intend to focus consumers' attention on that higher total, presumably with the hope that competition will then drive the total price down to the level of the presently advertised net fares. The states also may hope that by standardizing the advertising of airfares they can force the standardization of the fares themselves, even though this would inhibit the innovation that Congress intended to foster. In these various ways the NAAG Guidelines constitute deliberate intermeddling with competitive airline pricing strategies—an intermeddling that obviously runs counter to the express statutory

policy of deregulation and stands in various ways "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 423 (1986) (state law requiring natural gas to be purchased ratably is preempted by federal statute allowing price to be determined by market forces).

Consequently, there is no room here for the "strong presumption against finding preemption" on which the states rely. 31 States Br. 8. The central purpose of the *Airline Deregulation* Act, as its very name indicates, was to relieve airlines from burdensome federal and state regulation. There obviously can be no presumption against finding that the Act bars enforcement of newly formulated state rules specifically designed to regulate airlines. Moreover, although a presumption against preemption may serve as a guide to construing statutes that do not speak to the question, it can have little force where, as here, the statute itself expressly preempts. *Cf. English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990).

Even in cases involving only implied preemption, the presumption urged by the states is not allowed to undermine clear federal statutory objectives. This is amply illustrated by the Court's decision in *Schneidewind*, where the State of Michigan sought to regulate the issuance of securities by the operator of a natural gas pipeline—a regulatory power that the Federal Energy Regulatory Commission ("FERC") lacks. *See* 485 U.S. at 309. This Court reasoned that in view of the close linkage between a firm's capital structure and the rates it can charge, the state's effort to regulate the issuance of securities constituted the indirect regulation of rates. *Id.* at 308. Such state regulation, the Court concluded, is preempted by the comprehensive scheme of federal regulation pursuant to which FERC sets rates. *Id.* at 300.

It is instructive to compare the instant case with *Schneidewind*. The detailed regulation of rate advertis-

ing, like the regulation of securities issuance, necessarily and directly bears upon rates themselves. But unlike FERC, DOT has express regulatory authority, pursuant to section 411(a) of the FAA Act, over the very matters the states seek to regulate in this case. And here the issue is one of express and not, as in *Schneidewind*, merely implied preemption. The presumption urged by the states, which was unavailing in *Schneidewind*, *a fortiori* is unavailing here. Industry-specific state regulations dictating the format and content of airfare advertising simply have no place in the freely competitive marketplace envisioned by Congress when it enacted the Deregulation Act.

IV. THE NAAG GUIDELINES DEFEAT BOTH THE AVOWED FEDERAL INTENTION TO OCCUPY THE FIELD AND THE EXPRESS CONGRESSIONAL OBJECTIVE OF UNIFORMITY

Immediately after enactment of the Deregulation Act, the CAB read section 105(a)(1)'s explicit preemption of state law as a mandate to "occupy[] the entire field of economic regulations." 44 Fed. Reg. at 9948. Reviewing the legislative history, the CAB concluded that preemption was designed both "to prevent State economic regulation from frustrating the benefits of decreased Federal regulation" and to "prevent conflicts and inconsistent regulations.'" *Id.* at 9949, quoting H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16 (1978). The effect of preemption, taken together with the CAB's new responsibilities under the Deregulation Act and its continuing authority under the FAA Act, was to bestow upon the CAB "economic regulatory responsibility for all operations of carriers with Federal authority to the exclusion of the States." *Id.* The CAB therefore stated its intention to "exercise sole and complete regulatory jurisdiction over all federal carriers' operations." *Id.* at 9950.

The CAB did not attempt to define more precisely the extent of its exclusive regulatory jurisdiction. Nor did

it attempt to catalog all areas of possible state regulation that it believed to be preempted. Instead, it promulgated a new regulation which recited the terms of section 105(a)(1) and added that "[e]xamples of regulatory actions preempted under this section include, but are not limited to, tariff filing, certification, regulations governing flight frequency, mode of operation, in-flight amenities, liability, insurance, bonding, and capitalization." 14 C.F.R. § 399.110(d) (1990). In the regulatory preamble, the CAB explained why state regulation of such matters as insurance, bonding, and capitalization was preempted:

> [R]egulation of capital structure, minimum insurance requirements, bonding, etc. motivated by a desire to protect the quality of service is included with the preemption imposed in section 105. Such regulations necessarily involve a balancing of such considerations as the need to assure carriers' financial integrity and further other goals of consumer protection, and at the same time, to reduce the barriers to entry and encourage competition. Such balancing is essential to the success of deregulation and reliance on the free market, and it is specifically within the Board's province. For states to impose different requirements would interfere with the federal deregulation program both by imposing different priorities than those selected by the Board and by creating confusing multiple regulations of the same subject matter.

44 Fed. Reg. at 9951.

The CAB's discussion of these matters is significant in at least three respects. *First*, the CAB clearly understood that the preemption of state laws "relating to rates, routes, or services" sweeps broadly and is not limited solely to laws that directly determine rates, routes, or services. For example, if indeed the CAB considered federal preemption to embrace only "utility-type regulation," *see* 31 States Br. 14, its treatment of insurance, bonding, and capitalization reveals that its view of what consti-

tutes such regulation was very different from that now advanced by the states. *Second*, the CAB also understood that the scope of federal preemption must be determined by reference to the statutory objective of deregulation. Matters such as insurance, bonding, and capitalization are beyond the reach of state regulation because of the close relationship they bear to an airline's ability to charge certain rates or to offer certain routes and services in the newly deregulated economic environment. The same close relationship exists in the case of airfare advertising. *See* pp. 32-40, *supra*. Third, the CAB explicitly recognized that state efforts to impose requirements relating to insurance, bonding, and capitalization in the name of "consumer protection"—efforts that prefigured the requirements relating to advertising imposed by the NAAG Guidelines—interfere with the federal deregulation program and thus are preempted.

The states take comfort from the fact that the CAB did not specifically mention state regulation of airfare advertising. 31 States Br. 14. That omission, however, is neither surprising nor significant. Because of the prior absence of price competition in the airline industry, airfare advertising had been of little importance and, as of 1979, had attracted virtually no regulatory attention. Nor is it significant that the CAB, when staking out its claim to exclusive regulatory jurisdiction, made no specific reference to its authority over unfair and deceptive practices pursuant to section 411(a) of the FAA Act. That authority, which is conferred by the subchapter of the FAA Act captioned "Air Carrier Economic Regulation," is unambiguously included within "the entire field of economic regulation." 44 Fed. Reg. at 9948. It obviously represents a significant feature of federal "regulatory jurisdiction over . . . [air] carriers' operations." *Id.* at 9950.

Texas contends that the CAB later "expressed its opinion that the states are not preempted from regulating

advertising." Texas Br. 22 n.12. This is a reference to a memorandum prepared by the General Accounting Office, stating that "it is unclear whether the Congress intended preemption to extend to enforcement of broad consumer protection statutes regarding consumer complaints arising from air transportation services" and reporting, in the nature of unattributed hearsay, that "CAB suggests that such enforcement would not be preempted." General Accounting Office, *Report to the Chairman, Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation*, GAO/RCED-84-154, App. I at 7 (June 13, 1984). But such consumer complaints about services do not implicate federal authority over unfair and deceptive practices. The hearsay on which the states rely thus has nothing to do with this case. Certainly the CAB never suggested that the Deregulation Act permits the states to impose industry-specific guidelines dictating precisely what airlines can and cannot say when advertising their rates.

When Congress enacted the Sunset Act in 1984, transferring regulatory jurisdiction from the CAB to DOT, it stressed the importance of maintaining an exclusive, federal "uniform system of regulation" with respect to unfair and deceptive practices in the airline industry. H.R. Rep. No. 793 at 4. Congress expressed concern that regulations which "var[ied] from state to state . . . would be confusing and burdensome." *Id.* Indeed, Congress was so concerned with ensuring uniformity and preventing the imposition of conflicting standards that it rejected suggestions that DOT might share its authority for consumer protection with the FTC, explaining that such "overlapping authority" would be "confusing and inefficient." *Id.* at 6. Subsequently, in the exercise of its exclusive authority, DOT has responded to these congressional concerns by making explicit what already had been implicit under the CAB: section 105(a)(1) of the Deregulation Act "dictate[s] that there be one industry-

wide price advertisement standard." 54 Fed. Reg. at 31054.

In short, both the CAB, acting under the FAA and Deregulation Acts, and DOT, acting under those statutes and the Sunset Act, have undertaken to occupy the field of economic regulation, specifically including the regulation of price advertising, and they have done so with the blessing and active encouragement of Congress. The NAAG Guidelines simply do not fit into this scheme. The Guidelines represent an intrusion by the states into a field that already has been staked out as an exclusively federal domain. This intrusion cannot be tolerated under the Supremacy Clause.

The NAAG Guidelines offend, in at least three separate and significant ways, the principle of uniformity that Congress was so intent upon preserving. *First*, by their very existence the Guidelines represent the assertion of "overlapping authority." H.R. Rep. No. 793 at 6. The Guidelines establish a set of standards in competition and potential conflict with those that DOT has proposed or may adopt. Indeed, there is an "imminent possibility" of direct conflict, *Schneidewind*, 485 U.S. at 310, for the pending DOT rulemaking proposes two rules that flatly contradict requirements established by the Guidelines. *See* pp. 36-37, *supra*. Moreover, the general philosophy of the Guidelines, which is to prescribe detailed rules for every facet of airfare advertising, is so contrary to the spirit of the Deregulation Act and to the regulatory philosophy of DOT that innumerable additional conflicts may be foreseen for the future.

Second, the NAAG Guidelines are in actual and direct conflict with DOT Order 85-12-68. Whereas that order expressly "permit[s] the exclusion of the U.S. international departure tax from the total advertised price," J.A. 37a-38a, the Guidelines are precisely contrary. They require that "[a]ny . . . tax . . . must be included in the total advertised price of the fare." U.S. App. 26a. Although the states seek to minimize this conflict by contending that Order 85-12-68 is procedurally invalid, 31 States Br. 24, the order in fact has never been challenged.

Third, in addition to posing actual and potential conflicts between federal and state law, the NAAG Guidelines expressly hold out the further prospect of nonuniformity and conflict among the states themselves. The Guidelines are explicitly made "subject to the exercise of . . . individual prosecutorial discretion, and variations or supplementations" by the separate states. U.S. App. 7a. This indicates that some states may try to enforce their own customized versions of the Guidelines, creating the possibility of multiple and conflicting industry-specific state rules governing the advertising of airfares. The imposition of onerous double or multiple standards would be intolerable in an industry that relies so heavily on interstate media in advertising its prices. As the FTC correctly pointed out in opposing adoption of the NAAG Guidelines, airfare advertising has a "uniquely interstate nature." App. A, *infra*, at 3a. Conflicting state rules would make "it virtually impossible to put together nation-wide advertising programs that accurately portray the price of [the airlines'] services." 54 Fed. Reg. at 31054.

"In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989). Congress did not intend its deregulation of the airline industry to "be interpreted as an invitation to the States to impose additional regulations." *Transcontinental Pipeline*, 474 U.S. at 423. "Section [105(a)(1)] insures that the prices at which [airline ticket] sales occur to consumers, and the accompanying advertising, can proceed

under a legal standard uniform nationwide." *Illinois Corporate Travel*, 889 F.2d at 754-55. The states have not been left free to promulgate new regulations that would put airlines into straitjackets—indeed, into multiple and possibly conflicting straitjackets—concerning what they lawfully can and cannot say about their rates.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

[SEAL]
Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 1, 1987

Mr. Christopher M. Ames
Deputy Attorney General
Office of the Attorney General
Department of Justice
350 McAllister Street, Room 6000
San Francisco, California 94102

Dear Mr. Ames:

On September 10, 1987, Attorney General William L. Webster, Chairman of the Consumer Protection Committee of the National Association of Attorneys General, invited the Commissioners to comment on the September 2 draft of enforcement guidelines prepared by NAAG's task force on the air travel industry. He asked that comments regarding the "substance, form, effect, [and] unintended results" of the proposal be forwarded to you by September 30, 1987. Although the limited time available does not permit a comprehensive analysis of all the issues thus presented, the Commission is pleased to offer its general comments on some of the essential features and important consequences of the proposed enforcement policy.

With these draft guidelines, the task force is considering recommending that NAAG adopt specific regulatory schemes for three areas of the air travel industry. First, the guidelines would require all advertisements of fares to disclose prominently all material conditions connected with the purchase of tickets and require that airlines make available a sufficient number of seats on each flight to meet reasonably anticipated demand for any advertised

fare. Second, the guidelines would regulate some terms and conditions of frequent flier programs. Third, the guidelines would require disclosure of all terms and conditions of incentives offered to induce passengers to surrender their seats on over-booked flights.

For the reasons explained below, the Commission recommends that the task force refrain from recommending these draft guidelines.

The Commission is seriously concerned that the remedies contemplated in the guidelines, especially the advertising provisions, could have the unintended consequence of substantially inhibiting effective price competition among the airlines. In addition, the draft guidelines might result in inconsistent federal and state regulation. Rules such as those in the current proposals could reduce the estimated $10 billion of annual benefits—in lower fares and more flights—that are flowing from deregulation.[1] Unless the task force has evidence indicating that airline fare advertising, frequent fiier programs, or overbooking compensation policies are generally unfair or deceptive, the legal and factual bases for the draft guidelines are not clear. All of these issues deserve careful consideration prior to adoption of these guidelines.

The Commission is well aware of reports that the dramatic increase in air travel has resulted in problems. A recent surge of complaints—primarily concerning late flights, lost baggage, slow refunds, and poor service—has commanded wide publicity, as well as the attention of both the Congress and the Department of Transportation. These complaints have accompanied, and in large measure appear to reflect, the rapid growth of

[1] S. Morrison & C. Winston, The Economic Effects of Deregulation 1 (1986). The authors' estimate of these benefits, which are given in 1977 dollars, have been converted to 1986 dollars.

air travel spurred by deregulation.[2] However, the problems consumers have encountered do not appear to stem from the advertising and marketing practices these guidelines address. Recent DOT complaint statistics indicate that barely one percent of the complaints DOT receives involve advertising.[3] Despite this small percentage of complaints, the task force guidelines would impose substantial barriers to price advertising which is critical to competitive pricing and low fares.

Finally, the task force's proposal ignores the important question of federal preemption. The Federal Aviation Act specifically preempts state regulation of airline rates, routes or services.[4] Some portions of the guidelines would appear to regulate rates and services indirectly, or at least have a substantial impact on them. Moreover, the guidelines as a whole ignore the uniquely interstate nature of the advertising at issue. The Department of Transportation already regulates airline advertising under section 411 of the Federal Aviation Act, which generally prohibits unfair or deceptive acts or practices. Under this authority DOT reports that it has already taken informal action to correct questionable advertisements[5] and, in addition, maintains a consumer affairs office to resolve individual consumer complaints, including complaints about advertising. In light of DOT's active

[2] According to the Department of Transportation, air travel has increased by over 50% since 1977, based on "enplanement" data accumulated by DOT.

[3] Department of Transportation, Air Travel Consumer Complaint Report, June and Year-to-Date 1987.

[4] 49 U.S.C. § 1305(a)(1) (1978).

[5] Testimony of Matthew Scocozza, Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Before the House Subcommittee on Aviation, Committee on Public Works and Transportation (June 9, 1987).

regulatory presence, the guidelines would impose duplicative and often inconsistent requirements.[6]

Section 1—Fare Advertising

Under this section every "restriction, limitation or other requirement which in any way affects the use or refundability" of an airline ticket must be prominently disclosed in all advertising of airline fares—whether print, radio, or television. The guidelines, by way of example, specifically list 13 separate types of restrictions that must be disclosed. In print ads disclosures must be made in 10 to 14 point type either adjacent to the fare price or in a box with the heading "Restrictions and Limitations." In television and radio ads, the same disclosures must be made orally in the "same pace and volume as the fare information."

The Commission has long recognized that omission of material information can make an advertisement or representation unfair or deceptive.[7] The Commission has been equally cognizant that this principle must be interpreted in a manner that will not stifle truthful advertising.[8] But the extensive disclosure requirements the task force has proposed could severely curtail the price advertising in this industry. As is true in other industries,[9] advertising has been a primary source of price

[6] We are aware of one state lower court decision upholding state regulation of airline advertising. That decision specifically reserved the issue of whether the state regulation had more than an incidental impact on airline rates. By contrast, the impact of the proposed guidelines would seem substantial. People v. Western Airlines, Inc., 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (Cal. Ct. App. 1984).

[7] *See, e.g.*, International Harvester Co., 104 F.T.C. 949, 1055-62 (1984).

[8] *See, e.g.*, International Harvester Co., 104 F.T.C. 949, 1062 (1984); ITT Continental Baking Co., 83 F.T.C. 865, 965 (1973).

[9] *See, e.g.*, J. Cady, Drugs on the Market: The Impact of Public Policy on the Retail Market For Prescription Drugs (1975); W. Jacobs *et al.*, Staff Report on Consumer Access to Legal Services: the Case For Removing Restrictions on Truthful Advertising

competition in the airline industry. The beneficiaries of aggressive advertising and competition are consumers. Advertising restrictions such as those that are contemplated in these guidelines would make it very costly to advertise present fare structures in print and all but impossible to do so on radio and television. Fifteen, thirty and sixty second commercials do not allow lengthy recitals of contract terms and conditions, yet are an important means of ensuring price competition. An airline would have little incentive to reduce fares if it could not advertise them. We urge NAAG not to take any action which will deprive consumers of the net benefits of fare advertising by airlines.

Advertising is seldom an appropriate vehicle for disclosing all material characteristics of a product or service. Consumers do not rely on advertising of this type to make a final purchase decision, and it does not serve that function. The goal of most advertising for discount airfares is to signal that bargain prices are available and suggest that consumers inquire further when they contact a travel agent or airline to make specific travel plans. Requiring too much information in ads can have the paradoxical effect of stifling the information that consumers receive. The Commission has recognized this in many other contexts. For example, in 1973 the Commission declined to require certain disclosures sought by the staff, recognizing that the disclosures sought would be "tantamount to a *de facto* ban on . . . advertising through the radio and TV media."[10] In 1979, the Commission rejected a staff proposal to require detailed disclosures of the conditions affecting a particular savings claim. Citing concerns about discouraging savings claims, the Com-

(1984); Kessides, Advertising, Sunk Costs and Barriers To Entry (1983); 15 Benham, *The Effects of Advertising on the Price of Eyeglasses*, 4 J.L. & Econ. 337 (1972); Steiner, *Does Advertising Lower Consumer Prices?* J. of Marketing, Oct. 1973, at 19.

[10] ITT Continental Baking Co., 83 F.T.C. 865, 965 (1973).

mission adopted a provision simply requiring a general disclosure that more detailed information was available.[11] A similar approach was adopted in the Commission's recent revision of its Guides Against Deceptive Advertising of Guarantees, where the Commission was again concerned that detailed disclosure requirements had discouraged useful advertising. The revised guides provide for a general disclosure that the full terms of the warranty are available prior to sale.[12]

There is probably even less reason for imposing detailed disclosure requirements in the airline industry than in the industries where the Commission has already rejected them. At least 75 percent of all airline tickets are now purchased through travel agents,[13] who are knowledgeable about the various conditions that apply to dis-

[11] In its Statement of Basis and Purpose for the Commission's Trade Regulation Rule on Labeling and Advertising of Home Insulation, the Commission said:

> [Savings] claims are designed to persuade consumers to purchase the products. Yet, because so many factors affect the savings achieved by an individual homeowner, any savings claim is untrue with respect to many consumers. . . .
>
> Instead of the approach suggested by the staff, the Commission has adopted a much simpler and far less burdensome disclosure provision. This provision is based on the conclusion that, to remedy the deception inherent in savings claims, consumers must be told that savings depend on many factors, and what those factors are. Since a disclosure containing all of this information would be lengthy, however, section 460.1(b) of the Rule simply requires a brief statement that savings vary and a reference to the fact sheets for further information.

44 Fed. Reg. 50218, 50234 (1979).

[12] 50 Fed. Reg. 18621 (1985).

[13] Testimony of Matthew Scocozza, Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Before the House Subcommittee on Transportation, Tourism, and Hazardous Materials, Committee on Energy and Commerce (May 19, 1987).

count fares. Full disclosure of all restrictions also can be obtained by direct ticket purchasers by calling the airline. Based on the information we have seen to date, it seems better for consumers that airlines remain free to make only general disclosures.

Other provisions of Section 1 raise similar concerns.[14] The most troubling of these remaining provisions is Section 1.7, which requires that any advertised fare must be available in sufficient quantity so as to meet reasonable demand on every flight. If such fares are not available, the advertisement must disclose two specific restrictions in accordance with earlier provisions *and* "disclose the quantity of seats available [at the discounted fare] on specific flights."

This requirement could substantially reduce the number of discount seats that airlines now offer consumers. Airlines currently employ extremely sophisticated computer programs to allocate fares on a flight-by-flight, day-by-day basis under "yield management" systems designed to ensure that each flight takes off with as many seats filled as possible.[15] Under this system, airlines continuously analyze the demand for seats on each flight and alter the mix of different fares in order to fill the flight. The number of seats available at different fares can change up to departure of the flight. As a result, the number of seats allocated at a particular discount fare may be taken 10 days before a flight, but cancellations or a change in demand may result in additional discount

[14] In addition to the restrictions on fare advertising, several other provisions, § 1.8 (Prompt Refunds), § 1.9 (Surcharges), and § 1.10 (Round Trip Advertising), regulate matters that it is our understanding DOT rules or orders already encompass. Moreover, it is our understanding that the task force proposal may conflict with those DOT regulations.

[15] *See* Washington Post, *High Sky Balancing Act As Airlines Juggle Discounts, Overbookings*, May 17, 1987, at H1.

seats becoming available two days before departure. Similarly, seats on flights departing at off-peak times may be offered at deeper discount fares in order to attract more customers. Moreover, fare adjustments are also made in order to meet competition from other airlines.

The complexity of the yield management pricing system is virtually impossible to explain in advertising. The flexibility to respond to demand by adjusting prices to fill each flight would be lost under the more static seat allocation program the task force's guidelines could impose. Depriving airlines of the necessary flexibility to offer deeply discounted fares will raise the cost of airline service while significantly restricting consumers' access to low fare air travel. As long as consumers understand that advertised low fares are available for only limited seating, there is no apparent basis for requiring the disclosure of the specific number of low fare seats available on each flight.

The draft guidelines do not offer an explanation of the factual or legal basis for such burdensome affirmative disclosure requirements in airline advertising. Nor does the information we have seen to date suggest that the failure to make the sweeping disclosures required by these guidelines could be viewed as an unfair or deceptive act or practice. Settled precedent and sound policy argue strongly against such requirements.

Law enforcement action may, of course, be needed when specific advertising is deceptive or omits critical information. It is our understanding that the Department of Transportation attempts to monitor advertising for such occurrences. On balance, action against particular instances of unfair or deceptive conduct may be preferable in this industry to more general regulation that also burdens advertising that is truthful and nondeceptive.

Section 2—"Frequent Flyer" Programs

Section 2 of the NAAG proposal sets forth a comprehensive substantive regulation of the terms and conditions of "Frequent Flyer Programs." There is only cursory discussion of the factual basis for these guidelines and no discussion of the legal basis for them.[16] However, this area would seem to be one in which careful consideration of both the facts and law is particularly critical. First, press reports and Congressional testimony of the Department of Transportation indicate that although certain airlines attempted to change their frequent flyer programs in the past, these changes were largely rescinded in response to concerns expressed by air travelers. In light of this response, it is not clear why NAAG believes there is a need for guidelines in this area. Second, the Department of Transportation has reviewed airline disclosures in frequent flyer programs and concluded that they give adequte notice to consumers of possible future changes.[17] Thus, it is unclear that the airlines are guilty of any unfair or deceptive acts or practices. Absent such a showing, the proposed remedial scheme, which imposes substantive requirements such as a one year pre-notification of any changes in terms of the program, would seem to lack justification.

Section 3—Denied Boarding Compensation

Section 3 deals with disclosure of policies on compensation for voluntary denied boarding. The Department of Transportation has regulations governing denied

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[16] In *Orkin Exterminating Co.*, D. 9176 (Dec. 15, 1986), the Commission held that under some conditions it is an unfair practice, under the Federal Trade Commission Act, to systematically breach contracts. But there is no discussion in this proposal indicating that these conditions are present here. Moreover, we are aware that a number of states have not enacted prohibitions against unfair acts or practices, on which authority we presume the task force would base such guidelines.

[17] Testimony of Matthew Scocozza, *supra* note 13.

boarding compensation.[18] Although these regulations do not specifically govern disclosure of conditions or restrictions on offers made to induce passengers to give up their seats in the event of overbooking, DOT has taken action in the past where problems existed. Again, without any factual analysis of the current need for this guideline, it is difficult to evaluate why the task force believes that state intervention is necessary here.

Conclusion

The economic evidence is clear that airline deregulation is providing major benefits to American consumers. A recent Brookings Institution study estimates that travelers save $10 billion each year from lower air fares and increased frequencies due to deregulation.[19] These gains were made possible by eliminating regulatory restraints that prevented carriers from taking advantage of the economies available in improving route structures and resource allocation. Most importantly, airlines are now also free to compete on price, with the result that from 30 to 50 percent of seats sold today are offered at a discount.[20]

Among the biggest winners in airline deregulation have been discretionary travelers who can plan their trips well ahead of time.[21] Because of deregulation, airlines can now offer this class of customer deeply discounted fares. Air travel is up 50 percent from 1977,[22] as the

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[18] 14 C.F.R. § 250 (1987).

[19] *See* S. Morrison & C. Winston, *supra* note 1. We do not have precise estimates of the nature and amount of any costs of airline deregulation, but have not seen evidence that they are significant compared to the benefits.

[20] *See* Washington Post, *supra* note 15, at H7 (quoting Robert Baker, Director of Intergovernmental and Consumer Affairs, U.S. Department of Transportation). It should be noted that there need be no inconsistency between economic deregulation of the airline industry and ensuring the safety of air travel.

[21] *See* S. Morrison & C. Winston, *supra* note 1, at 33-35.

[22] *See supra* note 2.

skies have been opened up to millions of people who could not afford air travel in a less competitive environment. The task force's draft guidelines may significantly reduce these benefits by subjecting the airline industry to burdensome and unnecessary new regulation while providing consumers very little in return. We therefore urge that the task force reconsider the need for these guidelines.

By direction of the Commission.

/s/ Benjamin I. Berman
BENJAMIN I. BERMAN
Acting Secretary

APPENDIX B

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590

General Counsel

October 19, 1987

Christopher M. Ames
Deputy Attorney General
Office of the Attorney General
Department of Justice
350 McAllister Street, Room 6000
San Francisco, CA 94102

Dear Mr. Ames:

This letter is in response to Attorney General Webster's request for our comments on the recommendations of the National Association of Attorneys General Task Force on the Air Travel Industry. We appreciate the concern of your association and its members with respect to airline advertising and are grateful for the opportunity to comment on your draft Guidelines. Air travelers have often benefited in the past from the vigorous actions of the states regarding fraudulent schemes or practices by some individuals or businesses. We hope that this beneficial enforcement will continue as a priority. However, we must point out that a number of the recommendations appear to be preempted by the Federal Aviation Act (49 USC § 1301 *et seq.*) or Department of Transportation (DOT) rules or would unduly burden interstate commerce.

In section 1, the Task Force attempts to ensure that more information about restrictions on airline fares is given consumers in media advertisements and that such restrictions are clearly presented. In general, we have no objection to such Guidelines, since they are refinements of

present Department policy to alert consumers about restrictions on fares. However, we are concerned that the cure for allegedly deceptive advertising not infringe on the ability of passengers to purchase airline tickets with various types of associated fares and services. Because of the burden that would be placed on airline fare advertising by the extent of the Guideline's "material restriction" requirement, an unintended outcome would also be a decrease in, or the elimination of, price competition and advertising to foster it or a reduction in restricted discount fares and airline seat-yield management. These are essential to a deregulated air transportation market. The importance of these goals is shown in section 105 of the Federal Aviation Act, which specifically bars State regulation of fares and services. Since the effect of the Guidelines would be to materially diminish the ability of airlines to advertise discount restricted fares, they would run afoul of this provision.

More particularly, subsection 1.1 lists 13 examples of restrictions that must be disclosed in media advertisements. By including this number of restriction types, with the specificity required, the Guidelines would, in effect, force carriers to place their extensive and detailed contracts of carirage in advertisements. The purpose of advertisements is not to describe every contractual restriction or limitation that a buyer must accept when purchasing a good or service, and we were aware of no industry where such disclosure in advertisements is required. Permission to incorporate contract terms by reference, including those dealing with specific requirements about restrictions on refundability, as well as their disclosure is, of course, also preempted by DOT rules (14 CFR Part 253). The last item in subsection 1.1 is especially troubling. It concerns ticket refund policies. That area is specifically preempted by Federal law. The Consumer Credit Protection Act through Regulation Z of the Federal Reserve Board (implemented for airlines by 14 CFR Part 374) specifically sets seven days for credit re-

funds, and Department enforcement orders (See e.g., Order 87-6-29) have set 20 days for cash refunds as the standard to be met. The refund provision in subsection 1.1 appears to imply different standards are permissible. Subsection 1.8, which recommends refund requirements, is also preempted for these reasons.

We urge you to continue to strive for non-misleading advertising, but to reduce or combine the specific covered restrictions in subsection 1.1 that must be disclosed. The purpose should be to alert the customer that certain important kinds of restrictions and limitations exist, not to restate each contract obligation or condition that the buyer and seller must accept. For this purpose, it is important to note that over 75 percent of all airline tickets are sold by travel agents who offer expertise about the intricacies of airline fares and the restrictions and limitations they incorporate. For all the reasons stated above and especially because of the expansiveness of subsection 1.1, we object to subsections 1.2 through 1.6 and to subsection 1.11 of the Task Force recommendations.

With respect to subsections 1.4, 1.5 and 1.6, we note that billboard advertisement is treated differently, without explanation, from other advertising media. We fail to see how the Task Force can justify requiring 10- or 15-second television or radio ads to state all "material restrictions" while billboard ads would be exempt. The result would be to discourage airline price advertising except on billboards—a result which appears unwarranted to us and which as implemented may run afoul of various State and Federal policies discouraging the proliferation of highway billboards, e.g., 23 U.S.C. § 131.

We also believe subsections 1.7 through 1.10 are preempted by statute and rule. Subsection 1.7 would require that seats be available in sufficient quantity to meet "reasonable" demand on every flight, every day, at the advertised price, subject only to limited exceptions. This guideline clearly conflicts with section 105 of the Act. It is

regulation of pricing policies of the airlines and is thus preempted. Airlines use sophisticated, computerized seat-yield management programs that vary seat availability frequently so as to be able to provide discount, higher restricted availability seats to discretionary passengers and to charge higher prices to on-demand non-discretionary passengers and thereby fly each aircraft as full as possible.

Prohibitions against advertisements for prices that are never available and requirements for the disclosure of fare restrictions and limited seat availability, in general terms, could be structured, however, so as not to interfere with airline fare policies.

Subsection 1.8 about refunds is preempted for the reasons discussed in reference to subsection 1.1 above.

Subsections 1.9 and 1.10, requiring surcharges to be included in the total price advertised and prohibiting advertisement of one-way fares based on roundtrip purchase only, respectively, are also in conflict with Federal rules. The Department rule on price advertising is in 14 CFR 399.84. That rule and Department interpretations of it follow separate disclosure of defined surcharges and the advertisement of one-way fares if the restriction on roundtrip-only purchase is disclosed. We believe the Guidelines are thus preempted in this area.

Section 2 of the Guidelines would place requirements on the advertisement and operation of airline frequent flyer programs. We believe that contract law adequately protects the members of frequent flyer programs who tend to be sophisticated individuals who can readily avail themselves of small claim or class action suits for redress of any abuses that might occur. Nonetheless, while we do not believe that the detailed regulation proposed—especially with respect to operation of the programs—is necessary, we do not object in general to such Guidelines.

We do object, however, to subsection 2.2.2. That subsection is most troubling. It requires a carrier to honor any ticket awarded to a frequent flyer program member for travel within 15 days prior to or after the date requested. Other passengers who purchase tickets having the same basic restrictions as the passenger with the awarded seat do not have that right. In addition, the specific time frame for redemption could have the effect of requiring the airline to displace passengers already ticketed. Similarly, the required guarantee of existing program rights for one year and the one-year notice of changed requirements in subsections 2.2.3., 2.2.4, 2.2.5. and 2.12. appear to present problems of substantive regulation under the statute and our regulations.

Again, advance disclosure of limitations on availability of entitlements and prohibitions on the offering of awards never available should be sufficient to prevent alleged abuses. State disclosure requirements consistent with out standards in this area may serve a valid legal function.

We would finally call your attention to the ramifications of the traditional filed-tariff doctrine, which considers each filed tariff to embody the entire contract of carriage. To the extent that any of these Guidelines may conflict with carrier rules contained in effective tariffs that are properly filed with the Department, the courts have consistently found such State requirements to be preempted. Carriers are still required to file and adhere to tariffs for "foreign air transportation" as defined in section 101 of the Act.

In general, we welcome State assistance in policing and preventing deceptive and misleading practices. I must express some caution, however, about the impact of these "uniform" State Guidelines. Adoption of such Guidelines, even if by all jurisdictions, could still lead to many different interpretations and exercises of enforcement discretion across the country. If differing application and interpretation should be so extensive as to conflict with

the Federal scheme for airline regulation or indirectly impair the ability to maintain an efficient national air transportation system, we would, of course, review our position on the continued viability of the Guidelines.

My staff and I will be glad to work with you concerning enforcement and interpretation and to discuss with you any differences we may have about the Guidelines. The point of contact in my office will be Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings, who can be reached at (202) 366-9342.

Thank you for the opportunity to comment on your initiative.

Sincerely,

B. Wayne Vance
B. WAYNE VANCE
General Counsel

APPENDIX C

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office of the Secretary

March 11, 1988

Mr. Christopher M. Ames
Deputy Attorney General
Office of the Attorney General
Department of Justice
350 McAllister Street, Room 6000
San Francisco, California 94102

Dear Mr. Ames:

This letter is submitted in response to the resolution of the National Association of Attorneys General (NAAG) inviting comments from the industry, consumer groups, federal agencies, and other interested parties, on the Air Travel Industry Enforcement Guidelines. The Commission appreciates the opportunity to comment.[1]

In comments on an earlier draft of the Guidelines, the Commission stated that the legal and factual bases for the proposed regulations of advertising, frequent flyer programs and overbooking compensation policies were unclear.[2] The Commission also expressed its concerns that the Guidelines could impose requirements inconsistent with current federal regulations and could inhibit effective price competition among the airlines. Although the *NAAG Task Force on the Air Travel Industry, Final Report And Recommendations* addressed some of those concerns, it has not allayed the Commission's fears that the Guidelines could unnecessarily burden truthful price advertising. The vast majority of air travelers are reported

[1] Commissioners Bailey and Strenio do not join in this letter.

[2] Letter from Federal Trade Commission to Christopher Ames, Deputy Attorney General, California (Oct. 1, 1987).

to use discount fares,[3] and the Commission is especially troubled by press reports suggesting that some airlines have reduced or eliminated their advertising of discount fares on television because of the disclosure requirements of the Guidelines.[4]

Because we believe that the legal and factual bases for the Guidelines have not been sufficiently elaborated and because we are concerned that the Guidelines may have discouraged truthful price advertising during the time that they have been in effect, we recommend that they be rescinded.

The Legal Basis for the Guidelines

The legal authority for the Guidelines remains far from clear. The *Final Report* contains virtually no discussion in support of the conclusion that advertising which fails to conform with the Guidelines' requirements is unfair or deceptive under state law. The *Final Report*[5] does not cite a single court decision finding unfairness or deception in the practices the Guidelines would discourage nor does it discuss the questions raised by the Commission in its letter of October 1, 1987, concerning the legal basis for the Guidelines. Analysis of prior Commission actions with respect to similar issues would seem particularly relevant to the work of the Task Force because of the many state statutes specifically referencing Section 5(a) of the FTC Act and the Commission's interpretations as

[3] *Economic Report of the President* (1988), at 203; *The Deregulated Airline Industry: A Review of the Evidence*, Federal Trade Commission Staff Report, (Jan. 1988), at 1. This percentage has been reported to be as high as 90 percent.

[4] *Wall St. J.*, Feb. 9, 1988, at 44, col. 2; *see also, Advertising Age*, Feb. 1, 1988, at 1, col. 1.

[5] *NAAG Task Force on the Air Travel Industry, Final Report and Recommendations*, (1987) (hereinafter cited as "*Final Report*").

guidance for construction of the state law.[6] In other states, such as New York, the relevance of the Commission's interpretation of Section 5 for purposes of construing state law has been established by case law rather than by statute.[7]

Similarly, the Task Force's *Final Report* does not address the significance of the disparities that exist in consumer protection authority from state to state, or discuss the legal basis for such broad disclosure requirements in states that have chosen not to vest in their attorneys

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[6] For example, the Texas statute, in relevant part states:

> (c)(1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)].

Tex. Bus. & Com. Ann. § 17.41 (Vernon 1968 & Supp. 1987). *See also, Ala. Code* § 8-19-1 (1986); Alaska Stat. § 45.50.545 (1986); Ariz. Rev. Stat. Ann. § 44-1522B (1987); Conn. Gen. Stat. Ann. § 42-110a (West 1987); Fla. Stat. Ann. § 501.201 (West Supp. 1987); Ga. Code Ann. § 106-1201 (Harrison 1984 & Supp. 1987); Idaho Code § 48-601 (1977 & Supp. 1987); Ill. Ann. Stat. Ch. 121 1/2, § 261 (1987); Me. Rev. Stat. Ann. tit. 5 § 206 (1986); Md. Com. Law Code Ann. § 13-101 (1983 & Supp. 1987); Mass. Gen. Laws Ann. ch. 93A § 1 (West 1984 & Supp. 1987); Mont. Code Ann. § 30-14-101 (1987); N.H. Rev. Stat. Ann. § 358:1 (1983); N.M. Stat. Ann. § 57-12-1 (1978 & Supp. 1985); Ohio Rev. Code Ann. § 1345.01 (Page 1979 & Supp. 1986); R.I. Gen. Laws § 6-13-1 (1985); S.C. Code Ann. § 39-5-10 (1976 & Supp. 1987); Tenn. Code Ann. § 47-18-101 (1984); Utah Code Ann. § 13-11-2 (1986); Vt. Stat. Ann. tit. 9, § 2451a (1984 & Supp. 1986); W. Va. Code § 46 A-1-101 (1986).

[7] *State v. Colorado State Christian College of Church Inner Power, Inc.*, 346 N.Y.S. 2d 482, 487 (1973). ("It is thus clear that the legislative purpose in enacting § 349 of the General Business Law was to follow in the steps of the Federal Trade Commission with respect to interpretation of deceptive acts and practices outlawed in § 5 of the Federal Trade Commission Act.")

general the power to prohibit unfair practices[8] or which have carefully circumscribed their deception authority.[9]

Finally, it is not apparent from the legal discussion of the specific sections of the Guidelines that the failure of an advertisement to meet a particular requirement would thereby render the advertisement deceptive or unfair even under the broadest state statutory provisions. The Task Force Report has not demonstrated that the Guidelines represent a general restatement of state law of unfairness and deception.

The Factual Basis for the Guidelines

The *Final Report* cites, as a primary basis for the Guidelines, a dramatic increase in the volume of complaints to state consumer protection and state attorneys' general offices.[10] The Task Force has not released the complaints on which it has relied. The *Final Report* also

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[8] Many state and territorial consumer protection acts are expressly narrower than the FTC Act, 15 U.S.C. § 45(a), in the breadth of the practices reached. Nineteen state and territorial statutes prohibit only deceptive acts or practices, or contain only limiting itemizations of prohibited acts. Ala. Code § 8-19-1; Ark. Stat. Ann. § 4-86-106; Ariz. Rev. Stat. Ann. § 44-1521; Colo. Rev. Stat. § 6-1-101; Guam Code Ann. § 53610; Ind. Code § 24-5-0.5-1; Iowa Code § 714:16; Kan. Stat. Ann. § 50-623; Minn. Stat. § 325.F.68-70; Nev. Rev. Stat. § 598-410; N.J. Rev. Stat. § 56:8-1; N.Y. Gen. Bus. Law § 349; N.D. Cent. Code § 51-15-01; S.D. Codified Laws Ann. § 37-24-1; Tex. Bus. & Com. Code Ann. § 17.41; Va. Code Ann. § 59.1-196; Wyo. Stat. § 40-12-102; Okla. Stat. tit. 15 § 751; D.C. Code Ann. § 3904.

[9] There is no analysis of how these statutes apply to any or all of the practices covered by the NAAG Guidelines. Colo. Rev. Stat. § 6-1-101; D.C. Code Ann. § 3904; Guam Code Ann. § 53610; Ind. Code § 24-5-0.5-1; Mich. Stat. Ann. § 445.901; Miss. Code Ann. § 75-24-1; Nev. Rev. Stat. § 598-360; Okla. Stat. tit. 15 § 751; Wyo. Stat. § 40-12-102. In addition, two states prohibit unfair and deceptive acts, but itemize the acts prohibited. Mich. Stat. Ann. § 445.901; Miss. Code Ann. § 75-24-1.

[10] *Final Report*, at 1-3.

does not state the number of complaints received, describe the nature of the complaints, or evaluate their validity.

As the Commission indicated in its letter of October 1, 1987, Department of Transportation (DOT) complaint statistics suggest that relatively few of the airline complaints that DOT receives concern advertising. During 1987, advertising accounted for less than 1 percent of complaints about airlines received by DOT. While the *Final Report* states that consumer dissatisfaction has reached crisis proportions, DOT complaint data show barely one advertising complaint per million passengers transported. The Commission is puzzled by the disparity between the figures reported by DOT, and the widespread and continuous complaints that the Task Force reports. The Task Force has not described its evidence that current airline fare advertising, frequent flyer programs, or overbooking compensation practices are subject to widespread, continuous or systematic deception or unfairness. It is therefore impossible to assess whether the Guidelines may be reasonably necessary to combat systematic deception, or may unnecessarily impose substantial costs on consumers to prevent isolated problems that might be better handled on a case-by-case basis. Therefore, it is important that the factual basis for the Guidelines be analyzed and shared with interested parties.

The Danger to Fare Advertising

As we noted in our letter of October 1, 1987, advertising is seldom an appropriate vehicle for disclosing all material characteristics of a product or service. Contrary to the conclusion in the Task Force's Comment to Section 2.1, it is not clear that consumers of air travel rely on advertising of this type to make a final purchase decision. A primary goal of advertising is to signal that bargain prices or new types of products or services are available and suggest that consumers inquire further.

Requiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive. The disclosure requirements contained, for example, in the broadcast commercial guideline may continue to be overly burdensome.[11] Indeed, there have already been press reports that airlines are curtailing their broadcast fare advertising in response to the Guidelines.[12]

Advertising serves as a primary vehicle for price and quality competition in numerous industries.[13] It is thus important that NAAG evaluate the Guidelines to ensure that they do not burden truthful advertising in a manner that may reduce information and hamper product innovation in the airline industry. Since an airline's incentive to create new products or services will depend on its ability to advertise them (typically by signalling the lower fare), the Guidelines' disclosure requirements threaten to reduce that price competition. The Task Force appears to have anticipated the chilling effect the Guidelines would have upon restricted discount fares. The *Final Report* states that one of the purposes of the Guide-

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[11] For example, the Air Transport Association (ATA) apparently believes that the Guidelines will make many broadcast commercials unintelligible and move airlines away from price advertising. Letter from James L. Casey, Assistant General Counsel, Air Transport Association, to Christopher M. Ames, Deputy Attorney General, State of California (Feb. 8, 1988).

[12] *Wall St. J.*, Feb. 9, 1988, at 44, col. 2; *see also, Advertising Age*, Feb. 1, 1988, at 1, col. 1.

[13] *See, e.g.*, J. Cady, Drugs on the Market: The Impact of Public Policy on the Retail Market for Prescription Drugs (1975); W. Jacobs, et al., Staff Report on Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising, Federal Trade Commission (1984); Kessides, Advertising, Sunk Costs And Barriers To Entry (1983); Benham, The Effects of Advertising on the Price of Eyeglasses, 4 J.L. & Econ. 337 (1972); Steiner, Does Advertising Lower Consumer Prices? J. of Marketing, (Oct. 1973), at 19.

lines is to "[d]iscourage airlines from advertising fares, the availability of which is unlikely to meet reasonable demand." [14] The *Report* goes on to state:

> [T]he FTC and the industry argue that if airlines are forced to disclose to consumers the conditions and limitations that attach to their price advertising, they will engage in less price advertising. But, if the competitive forces in the industry have generated intense price advertising now, there is no reason why those same competitive forces would not generate price advertising where the conditions attaching to the advertised offer are either clearly delineated in the ad *or, more likely, where the limiting conditions are simply dropped.* There is no *a priori* reason why the airlines would reduce price advertising *as opposed to dropping the conditions they would otherwise have to disclose or simplifying those conditions in conformance with the NAAG enforcement Guidelines.*[15]

Thus, the Guidelines could have an effect on the terms and conditions of discount airline fares as well as the advertising of those fares. Because the least expensive discount fares often have the most limiting conditions, anything that discourages such conditions may also discourage discount fares. Such a result would have a serious detrimental effect on consumers.

Conclusion

As we stated in our letter of October 1, 1987, law enforcement action may, of course, be needed when specific advertising is deceptive or omits critical information. DOT monitors airline advertising for such occurrences. On balance, action against particular instances of unfair or deceptive conduct appears preferable in this industry

[14] *Final Report*, at 13.

[15] *Final Report*, at 16. (Emphasis added).

to a more general regulation that also burdens advertising that is truthful and nondeceptive.[16] The Task Force unfortunately misconstrued our position as resting on "the unstated assumption that the states ought to tolerate deceptive and misleading advertising in order to encourage price advertising among airlines." [17] The Commission has never assumed or stated that states should tolerate deception in order to foster advertising. To the contrary, the Commission's position was, and remains, that law enforcement officials should not simply assume, without an adequate legal and factual basis, that deception exists, particularly when that assumption provides the basis for a regulation that has the potential to harm consumers.

The Commission recommends that the Guidelines be rescinded because they may have imposed unnecessary limitations on truthful and non-misleading advertising. It would be unfortunate indeed if the Guidelines unnecessarily were to deprive consumers of significant information about the availability of low airfares.

By direction of the Commission.

/s/ Emily H. Rock
EMILY H. ROCK
Secretary

[16] As we stated in our letter of October 1, 1987, DOT already regulates airline advertising under Section 411 of the Federal Aviation Act, which generally prohibits unfair or deceptive acts or practices. Under this authority DOT reports that it has already taken informal action to correct questionable advertisements and, in addition, maintains a consumer affairs office to resolve individual consumer complaints, including complaints about advertising. Testimony of Matthew Scocozza, Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Before the House Subcommittee on Aviation, Committee on Public Works and Transportation (June 9, 1987).

[17] *Final Report*, at 17.

APPENDIX D

Order 89-4-25

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
Office of the Secretary
Washington, D.C.

Issued by the Department of Transportation
on the 11th day of April, 1989

SERVED APRIL 11, 1989

PAN AMERICAN WORLD AIRWAYS, INC.

PROHIBITION OF ADVERTISING PRACTICES

CONSENT ORDER

The Department's policy on advertisement of air transportation, 14 CFR 399.84, requires that all price advertisements of flights, tours, or components of tours state the entire price of advertised flights, tours, or any tour components. The Department regards violations of section 399.84 as unfair or deceptive practices within the meaning of section 411 of the Federal Aviation Act. By Order 85-12-68, the Department granted an exemption from section 399.84 to allow advertisements that exclude the U.S. international departure tax from the total advertised price, provided that the advertisements clearly indicate both the amount of the tax and that all passengers are required to pay it in addition to the stated price. Subsequently, by Order 88-3-25, this exemption was amended to allow advertisements that list certain other taxes and government-imposed or government-approved fees separately, again provided that the amount of each such charge is clearly indicated in the advertisement (either separately or as a total).

Several months after issuing Order 88-3-25, finding clarification of that order to be warranted, the Department

issued Order 88-8-2. The latter order provides that government-imposed charges are only exempt from section 399.84 if they are levied on individual passengers and collected by the advertisers to be passed directly and entirely to the levying government. The order makes it clear that "per-passenger surcharges that carriers themselves set in response to charges which government entities levy on them without regard to individual passengers" are not exempt from section 399.84. Rather, such surcharges "must be included in the total airfare advertised." [1] The order also makes it clear why failure to include such surcharges in the advertised total price would be deceptive.

On March 2, 1989, in newspapers across the country, Pan American World Airways, Inc. (Pan Am) ran an advertisement of special low fares to various destinations. The advertisement listed the following charges separately: (1) a U.S. departure tax, security charge, and customs fee of $23, (2) an additional government-approved security charge for Latin American destinations of $10, and (3) fuel surcharges of $2, $2.50, and $5 for domestic flights from Florida, Boston, and Chicago, respectively. While we allow separate listing of the first two sets of charges, separate listing of fuel surcharges is prohibited by section 399.84. That prohibition was made even more explicit in Order 88-8-2:

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[1] Orders 88-3-25 and 88-8-2 have recently been overturned on procedural grounds by the U.S. Court of Appeals for the District of Columbia Circuit in *State of Alaska et al. v. U.S. Department of Transportation*, Nos. 88-1348 and 88-1682 (February 28, 1989). Nevertheless, it has been the Department's consistent enforcement policy not to prosecute airlines for listing the surcharges specifically identified in these two 1988 orders separately, because we do not regard separate listing of these surcharges as an unfair or deceptive advertising practice. For this same reason, we plan to continue this enforcement policy, and we do not intend to take enforcement action against the types of advertisements allowed by the two 1988 orders.

> Carriers are entitled to recoup their costs, of course, but surcharges set by the carriers themselves and not approved by a government entity as separate surcharges must be included in the total airfare advertised. *For example, if a local government imposes a per-gallon tax on aviation fuel purchased at its airport, a carrier is free to impose a surcharge on all tickets for flights departing from that airport. Regardless of such a surcharge's genesis, however, it must be included in the total advertised airfare.*[2]

The Office of Aviation Enforcement and Proceedings and Pan Am have agreed to settle this matter. In order to avoid costly and time-consuming litigation, and without an acknowledgement of liability, Pan Am agrees to the issuance of this order to cease and desist and to pay compromise civil penalties in the amount of $20,000, with $10,000 to be forgiven if the carrier refrains from similar activity for the next year. This settlement should dissuade Pan Am and other carriers from similar violations in the future.

This order is issued under authority contained in 49 CFR 1.57a and 14 CFR 385.22.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as in the public interest.
2. We find that Pan American World Airways, Inc., engaged in an unfair and deceptive practice under section 411 of the Federal Aviation Act and 14 CFR 399.84 when it listed fuel surcharges separately from fares in advertising its services in a number of newspapers. We order Pan American World Airways, Inc., to cease and desist from such activity.

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[2] Order 88-8-2 at 4 (emphasis supplied).

3. Pan American World Airways, Inc., is assessed $20,000 as a compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraph 2 of this order. Of this amount, $10,000 is due immediately, but the remaining $10,000 shall be forgiven if Pan American World Airways, Inc., does not engage in the conduct described in the second paragraph for the next year. If Pan American World Airways does engage in such conduct within the year, that $10,000 shall become due and payable immediately. Payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed wire," to the U.S. Treasury within 10 days of the service date of this order. The wire transfer shall be executed in accordance with the enclosed instructions. Failure to pay the penalty as ordered will subject Pan American World Airways, Inc., to assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

By:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

APPENDIX E

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590
General Counsel

Aug. 3, 1990

Honorable Warren Price, III
Attorney General of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813

Dear Mr. Price:

The purpose of this letter is to ask you to join the U.S. Department of Transportation in our efforts to prevent unfair and deceptive practices in the air transportation industry. As you may know, the Department is responsible for implementing and enforcing the Federal Aviation Act of 1958, 49 USC 1301 *et seq.* Section 411 of the Act, 49 USC 1381, prohibits unfair and deceptive practices in air transportation and its sale. In addition to section 411's general mandate, various Department rules, regulations, and policy statements promulgated under section 411 and orders issued under that section govern particular aspects of the air transportation industry, including advertising and other consumer protection matters.

Since the sunset of the Civil Aeronautics Board in 1985, this Department has enforced section 411 aggressively, primarily emphasizing consumer protection. In enforcement actions by the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, the Department has issued some fifty orders to cease and desist under section 411 and has assessed civil penalties totaling more than one million dollars. Seven of these orders and nearly $100,000 of the civil penalties have concerned un-

fair or deceptive fare advertising by airlines. Additionally, our Consumer Affairs Office has resolved consumer problems in innumerable cases where enforcement action would not have been appropriate.

The Department staff has enjoyed cordial relationships with many state officials in consumer affairs and Attorney General offices, and worked together with these state officials to resolve many airline consumer problems. However, it is our intention to do everything possible to achieve an even greater level of cooperation as we well recognize that we can carry out our enforcement program much more widely and effectively with your assistance then we can on our own. In fact, your assistance could well be critical in many cases.

Accordingly, we would request that any time that you become aware of any unfair or deceptive practice in the airline industry or any other potential violation of the Federal Aviation Act or our implementing regulations and policy statements (14 CFR Parts 200-399), contact should be made with Hoyte Decker, Chief of our Consumer Affairs Office (202-366-5957), or Sam Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings (202-366-9342). By working together we will certainly achieve the greatest possible success in protecting airline consumers. Your assistance in this important undertaking is very much appreciated.

Sincerely,

/s/ Phillip D. Brady
PHILLIP D. BRADY
General Counsel

APPENDIX F

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590
General Counsel

October 4, 1990

Honorable Warren Price, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Re: Nos. 90-221 and 90-232, *Jim Mattox, et al.*, v. *Trans World Airlines, Inc., et al.*, In the Supreme Court of the United States

Dear Mr. Price

Recently you and seven other state attorneys general submitted an amicus brief in support of the above-referenced petitions for writ of certiorari. One statement in your brief reflects an apparent misunderstanding of this Department's enforcement powers which we would like to clarify.

The statement in question is contained in the first sentence of the first full paragraph on page 8 of the brief. It reads—

> If state regulatory powers are preempted, the only penalty against an airline or related business engaged in false and deceptive advertising would be a cease and desist order issued by the Secretary of the United States Department of Transportation under 49 U.S.C. App. § 1381.

In fact, under section 901 of the Federal Aviation Act (49 U.S.C. App. § 1471), this Department has the au-

thority to impose civil penalties of up to $1,000 per violation and $1,000 per day for each day of a continuing violation of the pertinent provisions of the Act or any rule, regulation or order issued thereunder. The imposition of criminal penalties is also possible under 49 U.S.C. App. § 1472 for knowing and willful violations of those provisions. Since this Department assumed the powers of the Civil Aeronautics Board over consumer protection in the airline industry in January 1985, we have assessed civil penalties of more than $1,000,000 in consumer protection cases involving violations of section 411 of the Federal Aviation Act (49 U.S.C. App. § 1381) and have reached substantial settlements involving monetary restitution to consumers. The fact that we have collected substantial civil penalties in depective advertising cases was pointed out in our letter of August 3, 1990, which was sent to you and all other state attorneys general (copy enclosed). In addition, the Secretary's authority to issue enforcement orders has been delegated to various individuals within the Department under 49 CFR Part 1 (See, *e.g.*, 49 CFR 1.57a) and 14 CFR § 302.200 *et seq.* You may thus wish to correct the statement in your brief.

I trust that this information is useful to you and I am sending a copy of this letter to the other attorneys general who joined with you in filing your amicus brief and to the other Counsel of Record in the case. In closing, I would like to reiterate the invitation contained in our August 3 letter for increased cooperation in the area of airline consumer protection enforcement.

Sincerely,

/s/ Samuel Podberesky
SAMUEL PODBERESKY
Assistant General Counsel for
Aviation Enforcement and
Proceedings

APPENDIX G

Respondents' Parent Companies and Subsidiaries (Except Wholly Owned Subsidiaries)

TRANS WORLD AIRLINES, INC.

Parent Company

TWA Airlines, Inc.

Subsidiaries (Except Wholly Owned Subsidiaries)

Airline Data Resources, Inc.
Airport Terminal Services, Inc.
Ambassador Fuel Corporation
Ambassador Health Systems, Inc.
Blue Jay Investors Plan, Inc.
Century Air Rail & Land Insurance Company
Elytron, Inc.
Getaway Management Services, Inc.
International Aviation Security, Inc.
International Aviation Security N.V.
Mega Advertising, Inc.
Midcoast Aviation, Inc.
Midcoast-Little Rock, Inc.
Northwest 112th Street Corp.
Ozark Group, Inc.
Storm Haven, Inc.
Swan Management Corp.
The Getaway Group (U.K.), Inc.
The Travel Channel, Inc.
The TWA Ambassadors Club, Inc.
Transcontinental & Western Air, Inc.
Trans World Airlines (Australia) Pty. Ltd.
Trans World Airlines Services, Inc.
Trans World Computer Services, Inc.
Trans World Express, Inc.
Trans World Pars, Inc.
TWA America, Inc.

TWA Aviation, Inc.
TWA de Mexico, S.A., de C.V.
TWA Employee Services, Inc.
TWA Getaway Vacations, Inc.
TWA Group, Inc.
TWA International, Inc.
TWA Investment Plan, Inc.
TWA Maintenance Services, Inc.
TWA Nippon, Inc.
TWA Standards & Controls, Inc.
TWA-U.S., Inc.
World Marketing Services, Inc.

CONTINENTAL AIRLINES, INC.

Parent Company

Continental Airlines Holdings, Inc.

Subsidiaries (Except Wholly Owned Subsidiaries)

Continental—Eastern Sales, Inc.
TAC/SAS Quality Service Institute, Inc.

BRITISH AIRWAYS PLC

PARENT COMPANY

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio Thailand Limited
Air Mauritius Limited
Air Miles Travel Promotion Limited
Airinc Incorporated
Airline Tarriff Publishing Company
Anchorage Fuelling and Service Company Limited
Beau Vallon Properties Limited
Belfast Europa Limited
Bravo Communications Systems Limited

British Airways Medical Services for Travellers Abroad Limited
British Caledonian Flight Training Limited
Brussels Europa Limited
Covia Partnership
Dunwoody Airline Services (Holdings) Limited
Eupo-Air Holdings Limited
Eupo-Air Travel Services Limited
Euro-Hub (Birmingham) Limited
F R X International Limited
G B Airways (Holdings) Limited
Gambia Airways Limited
Hogg Robinson PLC
Home Assured Tenancy Limited
International Aeradio (Caribbean) Limited
Laxfuel Corporation
Los Angeles Technical Services Corporation
Los Angeles West Terminal Fuel Corporation
Mosside Enterprises Limited
Nigeria Aviation Handling Company
Ruby Aircraft Leasing and Trading Limited
San Francisco Foreign Flag Couriers Limited
Sapphire Aircraft Leasing and Trading Limited
Speedwing Logica Limited
Thai Airports Ground Services Limited
The Galileo Company Limited
The Plimsoll Line Limited

PAN AMERICAN WORLD AIRWAYS, INC.

Parent Company

Pan Am Corporation

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio, Inc.
Air Cargo, Inc.
Airline Tariff Publishing Company
Escola Americana de Rio de Janeiro

Honolulu Fueling Facilities Corporation
International Aeradio (Caribbean) Ltd.
Liberian Development Corporation
Manhattan Air Terminal, Inc.
Nigerian Aviation Handling Co.
Social Immobiliara Norteamericana, S.A.
Société International de Telecommunications Aeronautiques

AIR CANADA

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Air B.C. Limited
152160 Canada Inc.

COMPAGNIE NATIONALE AIR FRANCE

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Air Charter
Air Inter
Amadeus France
Ecole de Pilotage Amaury de la Grange
Esterel
Euroberlin France
Saresco (Société Aéroportuaire de Restauration, de Services et de Commerces)
Servair (Compagnie d'Exploitation des Services Auxiliaires Aériens)
SHM (Société des Hôtels Meridien)
Société Immobilière Aéroportuaire
Sodexi
Sotair (Société de Tourisme Aérien International)
UTA French Airlines

ALITALIA-LINEE AEREE ITALIANE, S.p.A.

Parent Company

Istituto per la Ricostruzione Industriale (IRI)

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeroporti di Roma—Societa per la Gestione del Sistema Aeroportuale della Capitale S.p.A.
Alidata S.p.A.
Alinsurance S.r.l.
Eurofly S.p.A.
Italiatour S.p.a.
Racom Teledata S.p.A.
Sigma—Societa Italiana Gestione Sistema Multi Accesso per Azioni
Sigma Travel System S.p.A.
Sisam S.p.A.

EL AL ISRAEL AIRLINES LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

None

FINNAIR

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Airplus Company Ltd.
Asunto Oy Heikkiläntalo
Asunto Oy Iso-Roobertinkatu 3-5-7
Asunto Oy Mannerheimintie 100
Asunto Oy Metsätorppa, Kauppalantie 48
Asunto Oy Octavus, Mannerheimintie 84
Asunto Oy Tenholantie 4

Finlandia Travel Agency Ltd.
Finnaviation Oy
Finnish American International Trade Inc.
Finnland Haus GmbH
Infa-Hotel
Kar-Air Ab
Karair Oy
Oy TEN-MAR Fastighets Ab
Suomen Matkatoimisto Oy

LUFTHANSA GERMAN AIRLINES
(Deutsche Lufthansa Aktiengesellschaft)

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Capital Gain International (1986) Ltd.
DLT Deutsche Luftverkehrsgesellschaft mbH
Delvag Rueckversicherungs-AG
Euro-Lloyd Reisebuero GmbH
Penta Hotel Managementges. mbH
Penta Hotels Muenchen GmbH
Penta Hotels N.V.
Reisebuero A.L.R. Atlantik Luft-Reederei GmbH

JAPAN AIRLINES COMPANY, LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Avionet (USA) Inc.
Global Laundry & Linen Supply, Inc.
Hotel Nikko Saipan, Inc.
International Inflight Catering Company
JAL International Service, Inc.
JAL Leasing (USA) Inc.

Japan Airlines Management Corp.
Lanovac, Inc.
Nikko Inflight Catering Company
Pacific Fuel Trading Corp.

QANTAS AIRWAYS LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio Thailand Limited
Air New Zealand Limited
Air Pacific Limited
Caterair Airport Services Pty. Limited
Fiji Resorts Limited
Gateway Passenger Services, LP
Holiday Tours & Travel Limited
Holiday Tours & Travel Pte. Limited
Holiday Tours & Travel SDN BHD
Holiday Tours & Travel (Thailand) Limited
Honolulu Fueling Facilities Corporation Inc.
Jetabout Holidays Pte. Limited
Jupiter Air (Australia) Pty. Limited
Laxfuel Corporation
Los Angeles West Terminal Fuel Corporation
Official Filing Company
Qadrant International Pty. Limited
QHF Insurance Brokers Limited
Société Internationale de Telecommunications Aeronautiques
Sun Tours Limited
Thomas Cook Limited
Tradegate Australia Limited
Travel Industries Automated Systems Pty. Ltd.

SCANDINAVIAN AIRLINES SYSTEM (SAS)*

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Airline Tariff Publishing Company
Airlines of Britain Holdings, PLC
Amadeus Marketing S.A.
Areliftarna AB
Asiana Catering Inc. Seoul
Aviatour Group
Aviation Holdings PLC
Brannstoflagret CPH Lufthavn I/S
Casino Copenhagen K/S
Casinos Denmark A/S, CASINO
Club de Vacaciones S.A.
Cofitour
Continental Airlines Holdings Inc.
Copenhagen Excursions A/S
Coronado A/S, CORONADO
Danair A/S
Danish Tankage Services I/S
Danish Refueling Services I/S
Dar es Salaam Airport Handling Company Ltd.
Gronlandsfly A/S
Helios Hotels S.A.
Hotel Scandinavia K/S, CPHZA
International Service Partners
Jetpak AB
Kamppi Hotel Oy, SHOY
Københavns Lufthavns Forretningscenter K/S (Copenhagen Airport Shopping Center K/S)

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* The SAS Group is made up of the SAS Consortium and its subsidiaries and affiliated companies. The SAS Consortium was formed by the three national airlines of Denmark, Norway, and Sweden: Det Danske Luftfartseiskab A/S (DDL), Det Norske Luftfartseiskap A/S (DNL), and AB Aerotransport (ABA), respectively. The subsidiaries listed in this appendix are the subsidiaries and affiliated companies of SAS.

LanChile S.A.
Malmo Flyterminal AB
Nord Norsk Hotelldrift A/S, NNH
Nordic Tel
Nordkaps Vel A/S, N.V.
Norweigian Show Case A/S
Plusresor AB
Polygon Insurance Co. Ltd.
Prövorörstensledningen I/S
Saison Holdings B.V., SAISON
SAS Catering Hellas S.A.
SAS Grand Hotel, Beijing, Joint Venture Co. Ltd., PEKZH
SAS Palais Hotel AG, VIEZH
SAS Royal Viking Hotel AB, TOZS
SAS Scandinavia Hotel A/S, CPHZA-1
SAS Trading Uruguay
Scanator AB
Scancenter A/S
Scandinavian Aero Engine Services AB
Scandinavian Info Link AB
Scandinavian Multi Access Systems AB
Scandinavian Multi Access Systems Danmark A/S
SIHSKA A/S, SIHSKA
Skipspost A/S
SMART Norge A/S
SMART Sverige AB
Soervanger Invest 8612
Son Corp S.A.
Spanair S.A.
Stavanger Realia K/S
Stockholm Convention Bureau
Sunet S.A.
Sunwing Hellas S.A.
Tekirova AS
Tenerife Sol S.A.
Tenk S.A.
Terminal Drift A/S

Toivelomat OY
Top of Europe A/S
Top of Europe A/S, TOE
Travel Academy AB
Travel Card AB
Uqqak Servisi Anonim Sirketi (USAS)
Vaterland Bussterminal A/S
VHH Vereinigte Hotel-Holding GmbH, VHH
Viajes Astral Canarias S.A.

VIAÇAO AÉRA RIO-GRANDENSE (VARIG)

Parent Company

Fundaçao Ruben Berta

Subsidiaries (Except Wholly Owned Subsidiaries)

Agripec S.A. Agropecuária Ind. Com Exportação
BANCO VARIG S.A.
Cia. Tropical de Hotéis
Cia. Tropical de Hotéis da Amazônia
Cia. Tropical de Hotéis do Nordeste
Cia. Tropical—Hotel Tambaú
Expressão Brasileira de Propaganda, Ltda.
Hotel de Bahia S.A.
Icaro Editora, Ltda.
Interlocadora S.A.
Rio-Sul Serviços Aéreos Regionais S.A.
Serviços Auxiliares de Transporte Aéreo S.A.
Sociedade Brasileira de Turismo Aéreo—"ROTATUR", Ltda.
Varig S.A. Arrendamento Mercantil
Varig Trading S.A.